IN THE

Supreme Court of the United States

October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

KING BROWN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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The District Attorney of New York County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review a judgment of the New York State Court of Appeals.

Opinions Below

The opinion of the New York State Supreme Court and its trial order dismissing the indictment (Apps. B and C, *infra*, pp. 2a, 3a) are unreported. The opinion of the Supreme Court, Appellate Division, First Department, and its order dismissing the People's appeal (Apps. D and F, *infra*, pp. 9a, 34a) are reported in 48 A.D.2d 95, 368 N.Y.S.2d 171 (1975). The order and opinion of the New York State Court of Appeals affirming the Appellate Division's order of dismissal (Apps. E and G, *infra*, pp. 14a, 35a) are not yet reported.

Jurisdiction

The judgment of the New York State Court of Appeals is dated June 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provision and Statutes Involved

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> • • • [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb • • •.

2. New York Criminal Procedure Law section 450.20 [subd. 2] provides:

> An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:
>
> • • •

> A trial order of dismissal, entered pursuant to section 290.10 or 360.40;

3. New York Criminal Procedure Law section 290.10 [subd. 1] provides:

> At the conclusion of the People's case or at the conclusion of all the evidence, the court may, • • • upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

4. New York Criminal Procedure Law section 70.10 [subd. 1] provides in relevant part:

> "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof • • •.

Question Presented

Does the Double Jeopardy Clause of the United States Constitution preclude an appeal by the State when the defendant is neither convicted nor acquitted but instead has his trial aborted by successfully moving to have his indictment dismissed on a legal ground that he could have raised before trial? The New York State Court of Appeals answered this question in the affirmative and held unconstitutional the state statute that authorizes such appeals.

Statement

At 10:00 p.m., on February 19, 1973, Angel Rodriguez was arrested for possessing a stolen car. About two hours later, while Rodriguez was still being booked, the respondent, King Brown, walked into the precinct station and offered the arresting officer money to release Rodriguez. The arresting officer pretended that he was going to agree and kept Brown waiting until officers from the Internal Affairs Division could come to the precinct house with a tape recorder. The arresting officer then spoke to Brown again, and he again offered the officer money. After recording the offer, the officer arrested Brown for bribery.

On March 20, 1973, Brown was indicted for the crime of bribery under a statute that read:

> A person is guilty of bribery * * * when he confers, or offers or agrees to confer, any benefit upon a public servant *upon an agreement or understanding* that such public servant's * * * judgment, action, decision or exercise of discretion as a public servant will thereby be influenced. (former N.Y. Penal Law §200.00 [1973], emphasis added).

There is, at least arguably, an ambiguity in the phrase "upon an agreement or understanding." Does the phrase refer only to the defendant's state of mind? Or, more implausibly, does the officer also have to agree that his judgment will be corruptly affected? If the latter, then Brown would not have committed bribery because, although he made a corrupt offer, the officer, in turn, did not accept.

Under New York law, Brown could have raised this issue before jeopardy attached by moving before trial to

dismiss the indictment on the grounds that evidence presented to the grand jury was insufficient as a matter of law (New York Crim. Proc. Law, §§210.20[1][b], 210.30).[1] In such a motion, Brown could have alleged that the police officer did not accept Brown's offer but instead arrested him. The trial judge would have reviewed the grand jury minutes, would have seen that Brown's allegation was true, and would have then had to face the legal question whether such an unaccepted offer is a "bribe" or any lesser included offense under New York law.

However, Brown did not make such a motion, although he moved before trial to dismiss the indictment on other grounds. So the case went to trial before a jury. At the close of the People's case, Brown moved to dismiss (a mo-

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1. CPL §210.20(1)(b) reads:

> 1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that: * * *
>
> (b) The evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense; * * *

CPL §210.30 reads:

> 1. A motion to dismiss an indictment or a count thereof, based upon the ground that the evidence before the grand jury was not legally sufficient to establish the commission by the defendant of the offense charged or any lesser included offense, must be preceded or accompanied by a motion to inspect the grand jury minutes, as prescribed in subdivision two.
>
> 2. A motion to inspect grand jury minutes is a motion by a defendant requesting the court to examine the stenographic minutes of a grand jury proceeding resulting in an indictment for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charges or a charge contained in such indictment. Such motion must be in writing and the moving papers must allege that there is reasonable cause to believe that the grand jury evidence was not legally

(footnote continued on next page)

tion for a "trial order of dismissal" under New York Criminal Procedure Law §290.10) on the grounds that a corrupt offer of money which is not accepted by the police officer is not a bribe under New York law.

The People's evidence clearly showed, and the trial judge so found, that Brown had offered to confer a benefit upon a public servant, and further that this offer was upon Brown's agreement or understanding that the public servant's action would be influenced (App. C, pp. 4a, 7a). Nonetheless, the judge dismissed the indictment because he agreed with Brown, as a matter of law, that the phrase "agreement or understanding" referred to both the defendant and the public servant:

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sufficient to support a specified count or counts of the indictment, and must contain sworn allegations of fact supporting such claim. Such allegations of fact may be based either upon personal knowledge of the affiant or affiants or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief must be stated.

3. If the court determines that there is reasonable cause to believe that the grand jury evidence may not have been legally sufficient, it must grant the motion to inspect the grand jury minutes. It must then proceed to examine the minutes and to determine the motion to dismiss the indictment.

4. If the court determines that there is not reasonable cause to believe that the evidence before the grand jury may have been legally insufficient, it may in its discretion either (a) deny both the motion to inspect and the motion to dismiss, or (b) grant the motion to inspect notwithstanding and proceed to examine the minutes and to determine the motion to dismiss.

5. In any case, the court must place on the record its ruling upon the motion to inspect.

6. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence.

> [t]he phrase "agreement or understanding" in this Court's analysis of the law refers to a concurrence by each of the two parties to the episode embraced by the indictment. That is, the offeror and putative offeree. The phrase embraces an exchange of promises by both persons or a mutual understanding that in return for the benefit or the money offered to the public servant —the offeree—that person will take or will not take or would make or not make a certain decision.[2] (App. C, p. 5a)

The People appealed to the Appellate Division under section 450.20(2) of the Criminal Procedure Law, which allows the People to appeal from trial orders of dismissal. Four of the five judges in the Appellate Division thought that the trial judge's ruling concerning the meaning of the bribery statute was clearly wrong (App. D, pp. 9a-10a). Nonetheless, relying on this Court's recent decisions in *United States* v. *Jenkins*, 420 U.S. 358 (1975) and *United States* v. *Wilson*, 420 U.S. 332 (1975), the Appellate Division dismissed the People's appeal on the grounds that retrial would violate the Double Jeopardy Clause of the United States Constitution (App. D, pp. 9a, 11a, 12a).

The People appealed to the New York Court of Appeals. That Court agreed with the Appellate Division and affirmed its order (Breitel, Ch.J., and Jasen, J., dissenting). (Apps. E and G, pp. 14a, 35a).

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2. During oral argument on the defendant's motion, the trial judge also expressed the view that there is no crime of attempted bribery under New York law. (Minutes of Trial, p. 120.)

A History of N.Y. CPL §450.20(2) Prior to the Decision Below

Criminal Procedure Law section 450.20(2) was passed in 1971 as part of a comprehensive revision of New York's criminal procedure. Before 1971, a defendant could make a motion for a directed acquittal at the end of the People's case. If that motion was granted, the People could not appeal. Under the new Criminal Procedure Law, the defendant can make a motion for a "trial order of dismissal" (N.Y. CPL §290.10). If that motion is granted at the end of the People's case and the indictment dismissed, as in this case, the new statute allows the People to appeal.

The reasons for this change are explained in the commentary that accompanied the proposed legislation:

> "This . . . change stems from the apparent injustice of denying the People any remedy when the trial court dismisses a charge during trial upon the basis of an erroneous determination of law that the trial evidence does not establish a prima facie case. An order erroneously dismissing an indictment upon the basis of allegedly insufficient grand jury evidence (§210.20 [1-b]) being a final judicial determination against the People, may properly be reversed and vacated upon an appeal by the People (*People* v. *Howell*, 1958, 3 N.Y.2d 672, 675, 171 N.Y.S.2d 801; *see* [Proposed] CPL §§110.10[1][b], 110.30)[3]; yet, a comparable and equally final and erroneous order with respect to trial evidence leaves the People helpless, and unconditionally frees a defendant against whom a prima facie case has been fully proven. This unsalutary gap in the former law is closed by a . . . provision according a right of appeal in such cases ([Proposed N.Y. CPL] §230.20[2])." Staff Comment to Proposed N.Y. CPL §150.20 at 219 (Edward Thompson Co. 1967).

3. *Accord, Serfass* v. *United States*, 420 U.S. 377, 388 (1975).

In 1974, the constitutionality of the new law was challenged in the New York Court of Appeals. The companion cases of *People* v. *Sabella* and *People* v. *Fellman*, 35 N.Y.2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100 (1974), *remit. amended* 35 N.Y.2d 853, 321 N.E.2d 880, 363 N.Y.S.2d 89 (1974), presented unique difficulties because each involved an appeal by the People from a trial order of dismissal issued by a judge sitting without a jury. In both cases, the judge had the power and responsibility to decide not only questions of law but also the question of the defendant's guilt or innocence. In these circumstances, the Court of Appeals had to scrutinize the dismissals to determine whether, regardless of the name attached to the judge's order, the defendant had in fact been acquitted on the merits. If so, the Court of Appeals would not allow a second trial and thus would not allow an appeal by the People. To permit a second trial after a verdict of acquittal would violate the policies at the core of the double jeopardy clause. If, after failing to convince the trier of fact that the defendant was guilty beyond a reasonable doubt, the government could try again, it would render meaningless the concept of "acquittal," diminish the values that are embodied in the requirement that the government sustain a burden of proof beyond a reasonable doubt, and increase the likelihood that innocent defendants would ultimately be convicted. If, however, the judge's dismissal was not a finding about the defendant's guilt or innocence, then the Court of Appeals would allow the People to appeal. In

these circumstances, although a second trial would inconvenience the defendant, it would not implicate any of the fundamental policies of the Double Jeopardy Clause.

In one of the two cases before it (*Sabella*), the Court of Appeals held that the trial order of dismissal was in effect a verdict of acquittal and so the People could not appeal:

> Here the defendant was clearly acquitted on the merits and it matters not that the court chose to characterize the holding as a dismissal on the law, which the defendant in any event had not requested. To allow the People to appeal this determination poses a threat to the defendant's right not to be placed twice in jeopardy for the same offense. 35 N.Y.2d at 166, 316 N.E. 2d at 574, 359 N.Y.S.2d at 107 (1974).

In *Fellman,* however, an appeal was allowed because the dismissal was based entirely on a legal conclusion about the proper standard applicable when the state's case is based on circumstantial evidence:

> In sum everything points to the conclusion that the defendant received precisely what he requested, a dismissal on the law which effectively aborted the trial short of verdict. Under these circumstances the statute grants the People the right to appeal. 35 N.Y.2d at 167, 316 N.E.2d at 574, 359 N.Y.S.2d at 108 (1974).

The Decision Below

Under the principles enunciated by the Court of Appeals, in 1974 it was clear that the People could appeal in this case—indeed much clearer than it had been in *Fellman.* Here, unlike in *Fellman,* the judge was sitting with a jury and thus was without power to determine the defendant's

guilt or innocence. *See* N.Y. CPL §§70.10, 290.10(1); Staff Comment to Proposed CPL §150.10 at 218 (Edward Thompson Co. 1967). The only body competent to decide that issue, the jury, did not do so because the defendant made a motion to dismiss the case, and the judge made an erroneous legal ruling about the meaning of a statute. The defendant was not "acquitted" in any sense of the word.

Nonetheless, in its decision below, the Court of Appeals reversed itself, decided the People could not appeal, and held section 450.20(2) unconstitutional. The People argued below that, under the Double Jeopardy Clause, there could be an appeal as long as the trial judge's dismissal was not in fact, or even arguably, a verdict concerning the defendant's guilt or innocence. According to the People, the restriction on government appeals was designed primarily to prevent the government from trying a second time to convict someone after he has been acquitted once for the same offense. Although the court believed that there was "much logic to support" the People's analysis (an analysis which was "fundamental to our holding in *People* v. *Fellman*"), still the court felt "constrained" by *United States* v. *Wilson, supra,* and *United States* v. *Jenkins, supra,* to apply the following "mechanical" rule: "the double jeopardy clause precludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from appellate reversal of the order sought to be appealed." (App. E, pp. 28a-29a). Under this rule, no order dismissing an indictment in the midst of trial can be appealed. Thus, in this case it was irrelevant that the dismissal was based entirely upon an erroneous legal ruling, that the ruling excused Brown entirely from facing

the only body competent to judge his guilt or innocence, that he could have obtained the same legal ruling and the dismissal of the indictment before jeopardy attached (when a government appeal would have been permissible, *see Serfass* v. *United States*, 420 U.S. at 388, *supra*), and that, instead, he waited to make his motion until after the prosecution put in its evidence.

The Dissent

Chief Judge Breitel and Judge Jasen believed that the People's appeal was permissible because:

> • • • there was not the slightest suggestion by the trial court that any of the People's proof was wanting in weight or credibility but instead the indictment was dismissed before anything had been submitted or considered by the fact-finders solely on a pure question of law. Since the jury never received the issues of fact there was never any possibility that a determination by the jury in favor of defendant had been made by them. (App. E, p. 32a).

Reasons for Granting the Writ

This case raises significant constitutional issues that will affect the administration of criminal justice throughout the United States. As we will demonstrate, the New York Court of Appeals has announced a new rule of double jeopardy law that would limit the right of prosecutors to appeal in twenty-six states, the District of Columbia, and the federal jurisdiction. In 1975, the issues presented here were expressly left open by this Court. As a consequence, there has already been extensive litigation; and there is already substantial conflict among the state and lower federal courts. We urge the Court to review this case, which presents these issues as clearly as any case is likely to do.

1. The New York Court of Appeals has announced a "mechanical" rule divorced entirely from the principles and policies of the Double Jeopardy Clause.

We understand that the office of this petition is not to brief the merits of the case. However, even a relatively cursory examination of the decision below will demonstrate not only that the New York Court of Appeals was wrong but, more importantly, that its new "mechanical" rule departs significantly from principles enunciated by this Court.

According to the New York Court of Appeals, the decision in this case could be reduced to one simple "mechanical" rule because the Double Jeopardy Clause is based on one simple prohibition—the "prohibition against multiple trials" (App. E, p. 26a). That phrase, however, does not resolve cases; it is simply shorthand for several concerns about the relationship of the individual and the prosecuting authorities. The phrase tells us that we care whether a defendant is tried more than once; it does not, without further analysis, tell us why we care and when these concerns override society's interest in having trial brought to "just judgments" (*Wade* v. *Hunter*, 336 U.S. 684, at 689 [1949]). The defendant's interest in not facing the financial and emotional strain of a second trial cannot, alone, explain the "prohibition against multiple trials." There are simply too many situations in which this and other courts have allowed a defendant to be tried more than once.[4]

4. *See, e.g., United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824) (upholding a second trial after the jury had been unable to reach agreement at the first trial); *United States* v. *Ball*, 163 U.S. 662, 671-72 (1896) (upholding a retrial following reversal of the conviction upon appeal); *Gori* v. *United States*, 367 U.S. 364 (1961) (upholding a retrial after the judge in the first trial granted a mis-

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Much more is at stake in the "prohibition against multiple trials." In some situations, the ability to try a defendant more than once for the same offense will give the state an unfair advantage over the defendant and provide a powerful tool for oppression. It is in these situations, when there exists the potential for oppression, that multiple trials are barred.

First, a prosecutor may begin a trial, see how it is going, become dissatisfied, and want a chance to start over again in more favorable circumstances or in front of a more favorable jury. In an adversary system like ours, the prosecutor should not be allowed such an advantage. Thus it is said that the defendant has a right to have his fate decided by the first jury (or finder of fact) (*United States* v. *Jorn*, 400 U.S. 470, 484 [1971], quoting from *Wade* v. *Hunter*, 336 U.S. at 689, *supra*). This right is protected by barring a retrial when a mistrial is caused by prosecutorial or judicial misconduct designed to avoid an acquittal (*see United States* v. *Jorn*, 400 U.S. at 485 n.12, *supra*), or when the reason the prosecutor asked for (and got) a mistrial is capable of being manipulated so that the prosecutor could see how the case was going and then decide whether he wanted the first tribunal to decide the case (*see Downum* v. *United States*, 372 U.S. 734, 737 (1963); *see also Illinois* v. *Somerville*, 410 U.S. at 464, *supra*). The reasons that support barring retrials in this situation do not apply when the defendant himself chooses to abort the trial before the first jury decides his case. That is why a retrial is usually allowed when a mistrial is granted upon the defendant's motion (*see, e.g., United States* v. *Dinitz*, —— U.S. at ——, 96 S.Ct. at 1080-81, *supra*).

trial, *sua sponte*, without defendant's consent); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964) (upholding a retrial following a successful collateral challenge to the voluntariness of a guilty plea entered during the first trial); *Illinois* v. *Somerville*, 410 U.S. 458 (1973) (upholding retrial after the judge, on the prosecutor's motion, granted a mistrial because the indictment was jurisdictionally defective); *United States* v. *Dinitz*, —— U.S. ——, 96 S.Ct. 1075 (1976) (upholding retrial after the judge, on the defendant's motion, granted a mistrial).

Second, the ability to retry a defendant might be used simply to harass him. Thus, before allowing a retrial, the courts demand a good reason why the first trial had to be aborted before verdict. If there is no reason, or if the reason is entirely insubstantial, no retrial will be allowed (*see, Jorn* v. *United States*, 400 U.S. 470, *supra*, as explained in *Illinois* v. *Somerville*, 410 U.S. at 469, *supra*). On the other hand, retrial is permitted if "there is a manifest necessity for the act [terminating the first trial], or the ends of justice would otherwise be defeated" (*United States* v. *Perez*, 22 U.S. [9 Wheat.] at 580, *supra*). Under this doctrine retrials have been allowed whenever there has been a reasonable basis for ordering the mistrial, even when the mistrial was not with the defendant's consent.[5]

Third, a defendant who has been (or who even arguably might have been) acquitted on the merits, must be protected from further attempts to convict him for the same

5. *See, e.g., Gori* v. *United States*, 367 U.S. 364 (1961) (upholding a second trial after judge, *sua sponte*, declared a mistrial because he had erroneously believed that the prosecution was about to bring out information of other crimes by the accused); *Wade* v. *Hunter*, 336 U.S. 684 (1949) (upholding a second court martial after wartime conditions made it necessary to terminate a first court martial); *Thompson* v. *United States*, 155 U.S. 271, 273-74 (1894) (upholding a second trial after a mistrial was declared because it was discovered that one of the jurors was legally disqualified from jury service).

offense. Put simply, if someone has gone through the trauma of having his guilt or innocence determined, and has won a verdict in his favor, that should be the end of it (*see, United States* v. *Green,* 355 U.S. 184, 187-88 [1957] [barring retrial after an "implicit acquittal." 355 U.S. at 190]). Even beyond humanitarian concerns for individual defendants there are important reasons why, in this society, a defendant who has been acquitted should not be subjected to a second trial. Americans cherish individual liberty and have given meaning to this value by creating a system of justice that makes it difficult for the state to take away someone's liberty. The burden of proving the defendant's guilt is placed on the state; and that burden is satisfied only upon proof beyond a reasonable doubt. Nothing is more fundamental to our system of law (*see, In re Winship,* 397 U.S. 358, 363-64 [1970]). The requirement that the government prove the defendant's guilt beyond a reasonable doubt would be meaningless if, after having failed to convince the trier of fact at one trial, the government could continue to prosecute a person for the same offense until a conviction is obtained (*see* Note, Twice in Jeopardy, 75 Yale L.J. 262, 278 [1965]; *see also* Note, Government Appeals of Dismissals, 87 Harv. L. Rev. 1822, 1837-40 [1974]). Thus, the Double Jeopardy Clause, which preserves the first verdict, gives meaning to the important policies embodied in the requirement of proof beyond a reasonable doubt.

These are the three categories in which the "prohibition against multiple trials" has in fact barred a second trial. None of the reasons that support the prohibition applies here. There is no suggestion that the state wanted to

harass the defendant by trying him more than once or that the state sought an unfair advantage by trying the case before a second jury. The prosecutor wanted only one trial; he wanted to have the first jury decide the case. The defendant, however, in the midst of trial, asked for a legal ruling that he might have asked for before trial. He was the one who caused the case to be taken from the first jury. Finally, and most important, the defendant was not acquitted. Indeed, because of his motion and the judge's erroneous legal ruling, Brown never had to face the judgment of the only body competent to decide his guilt or innocence.

2. *Jenkins* and *Wilson* do not support the mechanical rule announced by the New York Court of Appeals; however those cases need further elucidation by this Court because they are ambiguous and have been interpreted in conflicting ways by state and lower federal courts.

The New York Court of Appeals below ignored the circumstances of this case and instead announced a "mechanical" rule that is divorced entirely from the reasons that support the "prohibition against multiple trials." The Court felt "constrained" to do so by language in *United States* v. *Wilson* and *United States* v. *Jenkins.* However, nothing in either case requires a rule that bars retrial or appeal, regardless of the circumstances, whenever a judge dismisses an indictment in the midst of trial.

In *Wilson,* after a jury convicted the defendant, the trial judge dismissed the indictment because the defendant had been prejudiced by a delay between the offense and the indictment. This Court held that the government could ap-

peal because, if successful on appeal, the government would not have to try the defendant again; the jury's guilty verdict could simply be reinstated. The Court said that the policies and prohibitions embodied in the Double Jeopardy Clause apply only when a defendant will be tried a second time. Thus a government appeal that does not present the possibility of a second trial will always be permissible (420 U.S. at 344-45, 352). The Court did not say the converse—that a government appeal that does present the possibility of a retrial will automatically be prohibited. In fact, the Court strongly suggested that if a successful government appeal would mean a retrial, the Court would then have to examine the various policies that support the "prohibition against multiple trials" in order to determine whether the retrial, and thus the appeal, would be allowed. The Court also said in *Wilson* that its main concern would be to prohibit retrials after, and thus appeals from, verdicts of acquittal.[6]

6. "Because we agree with the Government that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense, we have no occasion to determine whether the ruling in Wilson's favor was actually an 'acquittal' even though the District Court characterized it otherwise." 420 U.S. at 336.

In discussing the origins and history of the Double Jeopardy Clause, the Court in *Wilson* emphasized the prohibition of retrials after verdicts of acquittal. *See, e.g.*, 420 U.S. at 338, 340, 340, n.7, 341, n.9, 342, 343, 346, 347-49, 352. The Court concluded, "[W]e continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." 420 U.S. at 352.

United States v. *Jenkins* is more problematic. There the Court barred the government appeal and said "[I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 U.S. at 370). According to the Court of Appeals below, this sentence means that the prosecutor may never appeal if a successful appeal would require any further proceedings. And therefore it follows that the prosecutor may never appeal when an indictment is dismissed in the midst of trial. In context, however, the sentence means something different.

Jenkins was tried before a judge whose responsibility it was to decide the defendant's guilt or innocence as well as the legal issues. The government argued that the trial judge's findings showed that he had in fact found the defendant guilty but "dismissed" the indictment and "discharged" the defendant only because of an erroneous legal ruling. This Court acknowledged the difficulty of distinguishing between a verdict of guilt or innocence and a ruling on questions of law when a case is tried before a judge (420 U.S. at 366-67). Nonetheless, this Court disagreed with the Government's characterization. Although ambiguous, the trial judge's findings did not include any finding on the statutory element of "knowledge." This omission "may have reflected [the judge's] conclusion that the government had failed to establish the requisite criminal intent beyond a reasonable doubt" (420 U.S. at 367-68).[7] Thus, the trial

7. Earlier in the *Jenkins* opinion, the Court had noted that "the District Court may have believed that respondent could not be convicted for knowingly refusing to report for induction if respondent had acted in the belief that the board's order was illegal * * *" 420 U.S. at 362, n.3.

judge, who was the finder of fact, made ambiguous findings that, at least arguably, could be interpreted as a finding against the government and in favor of the defendant on the merits of his guilt or innocence. It was in this context, where there might have been a verdict of acquittal, that the Court said there could be no appeal because "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 U.S. at 370). We agree, as did the New York Court of Appeals in *Fellman* and *Sabella*, that a defendant who has been even arguably acquitted on the merits by the finder of fact cannot be retried.[8]

Regardless of whether we are right or the Court of Appeals below is right about what this Court meant in *Wilson* and *Jenkins*, those two cases, especially when read together with *Illinois* v. *Somerville* (410 U.S. 458, *supra*) and *Serfass* v. *United States* (420 U.S. 377, *supra*), have caused confusion. *Somerville* strongly suggests that there are some circumstances in which a defendant may be retried after an indictment is dismissed in the midst of trial.[9] And

8. Mr. Justice Brennan and Mr. Justice Douglas concurred in *Jenkins* on the ground that "the Double Jeopardy Clause bars the Government's appeal from the ruling of this trial court in respondent's favor." They cited only *Fong Foo* v. *United States*, 369 U.S. 141 (1962), which held that a defendant could not be retried after a jury returned a verdict of acquittal upon the judge's instruction.

9. In *Somerville*, the defendant was being tried when the prosecutor discovered that the indictment was defective. The prosecutor moved for a mistrial. The trial judge found that the defendant could not be convicted under the indictment and granted the prosecutor's motion. In effect, if not in form, the indictment was dismissed: after the judge's ruling, the defendant could not be tried upon the indictment. This Court permitted a retrial even though the ruling concerning the defective indictment had been precipitated by the state. Certainly, retrial would have been permitted also if the ruling had been made upon the defendant's motion. Based in part on *Somerville*, the Seventh Circuit has so held. *United States* v. *Lee*, —— F.2d —— (July 21, 1976).

if retrial is permissible under the Double Jeopardy Clause, so too would an appeal by the government be permissible. According to the decision below, however, *Jenkins* and *Wilson* hold that there are no circumstances in which the government can appeal after an indictment is dismissed in the midst of trial. And *Serfass*, decided one week after *Jenkins* and *Wilson*, says that this issue is still open: "[W]e of course express no opinion on the question whether a similar ruling by the District Court [dismissing an indictment] after jeopardy had attached would have been appealable" (420 U.S. at 394). *Serfass* left open a second question which is also involved here: "Nor do we intimate any view concerning the case put by the Solicitor General, 'of a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" (*Id.*).

Most of the courts faced with these seemingly conflicting statements have chosen the interpretation of *Jenkins* and *Wilson* that we would urge upon the Court: If, upon the defendant's motion, an indictment is dismissed in the midst of trial, then under *Jenkins* and *Wilson* retrial or appeal is automatically barred only when the dismissal is, or arguably might have been, a verdict of acquittal on the merits. Three courts have permitted retrials following dismissals in the midst of trial and have explicitly held that *Jenkins* and *Wilson* bar such retrials only when the dismissal was or might have been an acquittal on the merits (*United States* v. *DiSilvio*, 520 F.2d 247, 250, n.7 [3rd Cir. 1975]; *United States* v. *Kehoe*, 516 F.2d 78, 82-86, *reh. denied* 521 F.2d 815 [1975], *cert. denied* —— U.S.

——, 96 S.Ct. 1103 [Feb. 23, 1976], *reh. denied* —— U.S. ——, 96 S.Ct. 1687; *State* v. *Russo*, 70 Wisc. 2d 169, 175-76, 233 N.W.2d 485, 488-89 [1975]). In another case, the District of Columbia Court of Appeals allowed a government appeal and indicated that *Jenkins* and *Wilson* were not even relevant to the question whether the government can appeal when an indictment is dismissed in the midst of trial on grounds having nothing to do with the defendant's guilt or innocence (*United States* v. *Sedgwick*, 345 A.2d 465, 472, n.13 (D.C.Ct.App. 1975).[10] In five more cases, the courts have barred a government appeal or a retrial but only after determining that the dismissal was or might have been an acquittal on the merits (*United States* v. *Patrick*, 532 F.2d 142, 146-47 [9th Cir. 1976]; *United States* v. *Fayer*, 523 F.2d 661 [2d Cir. 1975]; *United States* v. *Lucido*, 517 F.2d 1, 3 [6th Cir. 1975]; *United States* v. *Martin Linen Supply*, —— F.2d —— [5th Cir. June 21, 1976] [petition for cert. filed July 27, 1976 (No. 76-120)]; *State* v. *Lewis*, 96 Ida. 743, 536 P.2d 738 [1975]).[11]

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10. In *Sedgwick*, the defendant moved to dismiss the indictment on the grounds of prosecutorial misconduct; the judge, *sua sponte*, granted a mistrial; subsequently he dismissed the indictment. The court allowed the government's appeal, reversed and remanded for a new trial. The opinion makes it clear that the result would have been the same if the judge had dismissed the indictment without first granting a mistrial.

11. In each of the first three cases (*Patrick*, *Fayer*, and *Lucido*), since the dismissals had been entered by a judge who was also the trier of fact, it is difficult to dispute the conclusion that the dismissals might indeed have been acquittals on the merits. In each of the latter two cases (*Martin Linen Supply* and *Lewis*), the judgment appealed from was entered by a judge who was sitting with a jury and who therefore was not the sole finder of fact. It is possible, then, to argue

(footnote continued on next page)

Other courts, however, disagree and read *Jenkins* and *Wilson* as did the New York Court of Appeals. For them, *Jenkins* and *Wilson* demanded a mechanical rule that prohibits appeal after an indictment is dismissed in the midst of trial, without regard to whether the dismissal was or might have been an acquittal on the merits. In *United States* v. *Sanford* (—— F.2d —— [9th Cir., May 27, 1976] [petition for cert. filed June 25, 1976 (No. 75-1867)]), there had been a hung jury. Before the retrial began the trial judge dismissed the indictment and the government appealed. The Circuit Court did not concern itself with whether the dismissal was, or might have been, a verdict of acquittal on the merits. Instead, acting on what it thought was the authority of *Jenkins* and *Wilson*, the Circuit Court dismissed the appeal because the proceedings ended in the defendant's "favor", "and the consequences of a reversal in favor of the government would be that [the defendants] must be tried again." Slip op. at 2. In *United States* v. *Means* (513 F.2d 1329, 1331-36 [8th

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that these two cases were wrongly decided because the judge's ruling was not, indeed it could not have been, an acquittal on the merits. It is also possible to argue, however, in the words of the Idaho Supreme Court, that the judge's ruling was based upon "a factual determination of innocence favorable to the defendant" which had to be "equated to a jury verdict of 'not guilty.'" *State* v. *Lewis*, 96 Ida at 750-51, 536 P.2d at 745-46. In other words, the correctness of the conclusion in each of the latter two cases depends upon whether the appellate court accurately described the trial judge's ruling as an acquittal on the merits. That in turn depends upon whether the trial judge in the respective jurisdiction had the authority to share the fact-finding function with the jury (*Compare United States* v. *Cravero*, 530 F.2d 666 [5th Cir. 1976], and *United States* v. *Weinstein*, 452 F.2d 704, 713-716 [2d Cir. 1971], with *United States* v. *Sisson*, 399 U.S. 267, 290 [1970]), and whether he did so in the particular case. In the instant case, there is no doubt that the trial judge, in dismissing the indictment, was not in any way sharing the jury's fact-finding function. He was, as the Court of Appeals said, acting on "a pure question of law, namely, what constitutes the crime of bribery?" (App., p. 16a).

Cir. 1975]), the Eighth Circuit prohibited the government from appealing a dismissal by a judge in the midst of a jury trial, even though the dismissal had nothing to do with the defendant's guilt or innocence. The Circuit Court found its "guiding consideration" in the same sentence in *Jenkins* that the New York Court of Appeals relied upon in this case. 513 F.2d at 1334.[12] Finally, the Tenth Circuit seems to have gone even beyond these courts. In *United States* v. *Morrison*, *United States* v. *Rose*, and *United States* v. *Kopp* (November 6, 1975, petitions for cert. filed April 23, 1976 [No.'s 75-1534, 1535, 1536]), each of the defendants had been found guilty by a judge who postponed sentencing and formal entry of judgment in order to reconsider an earlier denial of the defendant's motion to suppress. In two cases, the trial judge, after reconsideration, granted the suppression motion. In the third case, after reconsideration, the trial judge dismissed the indictment (*Kopp*). The Tenth Circuit held that *Jenkins* prohibited the government from appealing these orders even though each defendant had been convicted and even though it seemed that a successful government appeal would require upon remand nothing more than formal entry of judgment.[13]

12. Although we disagree with the Eighth Circuit's analysis and its reading of *Jenkins* and *Wilson*, its conclusion might have been correct because the dismissal there was caused by alleged instances of prosecutorial misconduct. *See* p. 14, *supra*; *cf. United States* v. *Sedgwick*, 345 A.2d at 472, n.13, *supra*.

13. The opinions in these three cases are not reported. They are are now pending before this Court (Nos. 75-1534, 1535, 1536). We reprinted in the Government's petitions for writs of certiorari which have served upon respondent copies of those petitions.

3. The issues presented in this case are important in many jurisdictions.

Resolution of the conflict engendered by *Wilson* and *Jenkins* is important not only to New York, whose Court of Appeals was "constrained" to reject its own earlier, well-considered decision and whose statute has now been declared unconstitutional, but also to the many other jurisdictions in which similar problems will have to be faced. Statutes or case law in the District of Columbia and seven states (Alaska, Idaho, Michigan, Missouri, North Dakota, Pennsylvania and West Virginia) permit the prosecutor to appeal when an indictment is dismissed on specified grounds in the midst of trial.[14] The United States and fourteen states (Arizona, Florida, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, North Carolina, South Dakota, Utah, Washington) have statutes that permit the prosecutor to appeal from the dismissal of an indictment.[15] These statutes do not, in

14. ALASKA STAT. §§22.05.010, 22.10.020, 22.15.240 (1971). *See State* v. *Parks*, 437 P.2d 642 (Alaska, 1968) and *Selman* v. *State*, 406 P.2d 181 (Alaska, 1965); D.C. CODE ANN. §23-104(c) (1973). *See United States* v. *Sedgwick*, 345 A.2d 465 (D.C. Ct. App. 1975); IDAHO—*See State* v. *Lewis*, 96 Ida. 743, 536 P.2d 738 (1975) (The State may appeal when an indictment is dismissed in the midst of a trial, although in some circumstances retrials are barred by the Double Jeopardy Clause.); MICH. COMP. LAWS ANN. §770.12 (b) (1968); MO. ANN. RULES, SUP. CT. R. CRIM. P. 28.04(a) (1975); N.D. CENT. CODE §29-28-07 (1974). *See State* v. *Allesi*, 211 N.W.2d 733 (N.D. 1973), 216 N.W.2d 805 (N.D. 1974); PA. STAT. ANN., tit. 17, §211.302 (1964), tit. 19, §481 (1964). *See Commonwealth* v. *Green*, 210 Pa. Super. 482, 233 A.2d 921 (1967); W. VA. CODE ANN. §58-4-18(a) (Supp. 1975), §58-5-30 (1966).

15. 18 U.S.C. §3731 (Supp. 1976); ARIZ. REV. STAT. ANN. §13-1712 (1969); FLA. STAT. ANN. §924.07(1) (1973); ILL. ANN. STAT. ch. 110A, §604(a)(1) (Smith-Hurd Supp. 1976); IND. CODE §35-1-47-2 (Burns 1975); LA. CODE CRIM. PRO. ANN. art. 912

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their terms, limit the right of appeal to instances when the indictment is dismissed before trial; and since, in each jurisdiction, there are some grounds upon which an indictment may be attacked in the midst of trial,[16] presumably the prosecution may appeal when the indictment is dismissed then as well.[17] In addition, there are five states (Arkansas, Colorado, Connecticut, Kentucky and Tennessee) in which the right to appeal is defined in such broad and general terms that, although the statutes do not deal

(West 1967); MD. CTS. & JUD. PRO. CODE ANN. §12-302(c) (1974); MASS. GEN. LAWS ANN. ch. 278, §28E (1970); MISS. CODE ANN. §99-35-103 (1972); MONT. REV. CODES ANN. §95-2403 (1969); NEV. REV. STAT. §§177.015(b), 177.025, 177.085 (1973); N.C. GEN. STAT. §15-179 (1975); S.D. COMPILED LAWS ANN. §23-51-2 (1967); UTAH CODE ANN. §77-39-4 (1953); WASH. CT. APP. R. APP. (CAROA) 14(8) (1974).

16. FED. R. CRIM. P. 12(b) and (f); ARIZ. R. CRIM. P. 16.1(b) (Supp. 1975); FLA. STAT. ANN., R. CRIM. P. 3-190 (1975); ILL. REV. STAT. ch. 38, §114-1(a)(6) and (8), and (b) (1965); IND. CODE §35-3.1-1-4 (Burns 1975); LA. CODE CRIM. PRO. ANN. arts. 535, 577, 594 (West 1967); MD. ANN. CODE, MD. R. P. §725(b) (1974); MASS. GEN. LAWS ANN. ch. 277, §47A (1972); MISS. CODE ANN. §§99-7-21, 99-7-23, 99-35-103, *but see Burchfield* v. *State*, 277 So.2d 623 (Miss. 1973); MONT. REV. CODES ANN. §95-1702 (1969); NEV. REV. STAT. §174.105 (1973); N.C. GEN. STAT. §15A-952(d) (1975); S.D. COMPILED LAWS ANN. §23-36-9 (1967); UTAH CODE ANN. §§77-23-10, 77-34-1 (1953); WASH. REV. CODE ANN. §10.40.125 (1974).

17. This conclusion is especially likely in the nine states that, by separate statutes, permit reprosecution after an indictment is dismissed in the midst of trial. ILL. REV. STAT., ch. 38, §3-4(d) (1969); LA. CODE CRIM. PRO. ANN. art. 595(3) (West 1967); MASS. GEN. LAWS ANN. ch. 263, §8 (1970); MISS. CODE ANN. §99-11-29 (1972); MONT. REV. CODES ANN. §§95-1705, 95-1706 (Supp. 1969); NEV. REV. STAT. §174.085(1) (1973); S.D. COMPILED LAWS ANN. §23-35-26 (1967); UTAH CODE ANN. §§77-24-11, 77-31-19, 77-31-24 (1953); WASH. REV. CODE ANN. §10.43.050 (1974); and in the federal jurisdiction where the right to appeal is as extensive as the Double Jeopardy Clause will allow. *See* 18 U.S.C. §3731 (Supp. 1976); *Serfass* v. *United States*, 420 U.S. at 387, *supra*.

with the subject explicitly, they probably permit the prosecutor to appeal when an indictment is dismissed in the midst of trial.[18]

If the New York Court of Appeals is right—if *Jenkins* and *Wilson* really mean that the state may not appeal when, upon the defendant's own motion, an indictment is dismissed in the midst of trial—then all these jurisdictions would be seriously affected, although precisely how is difficult to predict because the wording of particular statutes might leave a court with several options. In some cases, a statute would be held unconstitutional on its face; in others, unconstitutional as applied to particular appeals by the prosecution. In still other cases, the court might re-define the scope of the statutory right of appeal in order to avoid constitutional questions. In any event, deciding the correct meaning of *Jenkins* and *Wilson* about which there has been both confusion and dispute, is important.

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18. ARK. STAT. ANN. §43-2720 (1964) (The state may appeal when "error has been committed to the prejudice of the state * * *"); *see also* ARK. STAT. ANN. §43-1227 (1964); COLO. REV. STAT. ANN. §16-12-102 (1973) ("The prosecution may appeal any decision of the trial court * * * upon any question of law."); *see also* COLO. REV. STAT. ANN. §18-1-304(1) (1973); CONN. GEN. STAT. REV. §54-96 (1975) (The state may appeal from rulings "upon all questions of law arising on the trial of criminal cases."); KY. REV. STAT. ANN. §§21.140(3) and (4) (Supp. 1974) (The Commonwealth can appeal from "an adverse decision or ruling of the circuit judge" and the Court of Appeals may reverse the decision "in any case in which a new trial would not constitute double jeopardy or otherwise violate any constitutional rights of the defendant."); TENN. CODE ANN. §40-3401 (1975) ("Either party may [except where there has been a judgment of acquittal] pray an appeal in the nature of a writ of error * * *").

In sum, this case presents two related constitutional questions. First, may the state appeal when the defendant is not acquitted but instead, upon his own motion in the midst of trial, he has his indictment dismissed because of a judge's legal ruling? Second, how, if at all, is the state's right to appeal affected by the fact that the defendant had an opportunity to seek the legal ruling before trial but did not do so until after jeopardy attached? Precisely these questions were left open in *Serfass* v. *United States* (420 U.S. at 394, *supra*). With regard to the first, there already has been substantial litigation. Courts have come to conflicting conclusions in part because of the seemingly contradictory statements in several of this Court's recent decisions. The courts that have faced the second question have also come to opposite conclusions. In *United States* v. *Kehoe, supra,* the court held that a defendant "who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the Double Jeopardy Clause when his objections to the indictment are sustained." (516 F.2d at 86.) The New York Court of Appeals in this case thought it irrelevant that Brown could have raised before trial the legal issue upon which he later prevailed.

The record here presents these two questions clearly; no extraneous matters are raised. The issues need resolution and affect a substantial number of jurisdictions in addition to New York.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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* The assistance in the preparation of this brief by Ann Diamond, a student at New York University School of Law, is gratefully acknowledged.

APPENDICES

APPENDIX A

Indictment of King Brown

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

KING BROWN,

Defendant.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of BRIBERY, committed as follows:

The defendant, in the County of New York, on or about February 20, 1973 offered, and agreed to confer a benefit, to wit, a sum of money upon a public servant, to wit, a Police Officer of the Police Department of the City of New York, upon an agreement and understanding that said public servant's action, decision and exercise of discretion as a public servant would thereby be influenced.

FRANK S. HOGAN
District Attorney

APPENDIX B

Trial Order of Dismissal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Trial Term, Part 32

THE PEOPLE OF THE STATE OF NEW YORK

against

KING BROWN,

Defendant.

HAROLD BIRNS, J.:

At the conclusion of the People's case during the trial of the above indictment, the Court granted the defendant's motion for dismissal and issued an oral trial order of dismissal in a decision which was read into the record on April 10, 1974.

The official court reporter, Brenda C. Benjamin, is directed to transcribe the minutes of the aforementioned decision, and said transcript is incorporated into and made a part of this decision. This shall constitute the decision and order on the motion.

The Clerk of the Court is directed to forward a copy of this decision and order, with notice of entry, to the District Attorney and the attorney for the defendant.

Dated: New York, New York
April 24, 1974

Justice of the Supreme Court
HAROLD BIRNS

APPENDIX C

Decision on Trial Order of Dismissal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 32

Indictment #950/73

THE PEOPLE OF THE STATE OF NEW YORK,

against

KING BROWN,

Defendant.

100 Centre Street
New York, New York
April 10, 1974

Before:

HON. HAROLD BIRNS, J. S. C.
and a Petit Jury

DECISION

The Court: I will rule now, arguments having been completed. The defendant moves to dismiss the indictment on the ground that the People have failed to prove a prima facie case.

The indictment contains merely one count, charging the defendant with the crime of bribery, and that count reads as follows:

"The defendant in the county of New York on or about February 20, 1973, offered and agreed to confer benefit, to

wit a sum of money upon a public servant; to wit, a police officer of the Police Department of the City of New York upon an agreement and understanding that said public servant actions and decision and exercise of discretion as a public servant thereby be influenced."

The Penal Law in effect at the time this indictment was filed reads as follows:

"A person is guilty of bribery when he confers or offers or agrees to confer any benefit upon a public servant upon an agreement or understanding that such public servant's • • • judgment, action, or exercise discretion as a public servant will thereby be influenced."

It may be contended that the wording of the statute is ambiguous. We have heard a good deal of argument on the meaning of the phrase "upon an agreement or understanding". Nevertheless, it is obvious that this section contains three elements, each of which the People are required to establish in order to present a prima facia case:

First, that there must be an offer to confer a benefit. The word "benefit" is defined in our statute. Obviously the term "benefit" will embrace money which is offered.

Secondly, such offer must be made to a public servant. The term "public servant" includes a police officer of the City of New York and,

Third, that such offer of a benefit must be—that is to say—to a public servant must be—"upon an agreement or understanding that such public servant's judgment, action, decision or exercise of discretion as a public servant will thereby be affected".

In this case, the People have presented evidence as to the first two elements, but in my opinion the People have presented no evidence that such offer to a public servant of a benefit was "upon an agreement or understanding"

that such public servant's action or decision or exercise of discretion of public servant would thereby be affected.

The phrase "agreement or understanding" in this Court's analysis of the law refers to a concurrence by each of the two parties to the episode embraced by the indictment. That is the offeror and putative offeree. The phrase embraces an exchange of promises by both persons or a mutual understanding that in return for the benefit or the money offered to the public servant—the offeree—that person will take or will not take certain action or would make or not make a certain decision. Otherwise, there would be no necessity to include the phrase "upon an agreement or understanding" in defining the crime of bribery.

The crime of bribery could rest under those circumstances on a mere unilateral statement by an offeror to a public servant without bringing into play the phrase "an agreement or understanding" as the phrase now appears in the section defining bribery.

Under this section the crime of bribery is not made out if there is merely an offer by one person to confer a benefit upon a public servant. Of course the agreement referred to by statute need not be formal or expressly stated. It may be implied by virtue of all the facts and circumstances. There is, however, in this case not a scintilla of evidence to support a finding that there was in fact an agreement or mutual understanding by the defendant, Mr. Brown, and the public servant involved. Furthermore, in this Court's view there can be no understanding on the part of the defendant that the public servant would take or not take certain actions or would make or not make certain decisions unless the public servant said or did something from which an understanding could be expressed or inferred.

The District Attorney argues that the agreement or understanding is what the defendant had in mind at the time and that the words "upon an agreement or understanding" refer to what the defendant had in mind at the

time. The answer to this is that the section does not make it a crime to offer a benefit with the "hope" of obtaining an agreement or understanding with the public servant or with the intent to influence him in that respect.

The statute refers to the existence of an agreement or to the existence of an understanding as those words are ordinarily defined. This view is fortified by a comparision of Section 200.00 with its predecessor statutes, particularly Section 378 of the Penal Law, enacted 1909, which as far as applicable reads as follows:

Section 378 reads as far as that section is applicable: "a person who gives or offers or causes to be given or offered a bribe or any money, property or value of any kind or any promise or agreement, therefore, to a public officer * * * with intent to influence in respect on any act, decision, vote, opinion or other proceeding in the exercise or powers of functions that he has or may have is punishable by imprisonment of not more than ten years or not more than a fine of $5,000 or both." Here we see that our new Section has utilized language in the Section not found in Section 378 that is upon an agreement or understanding of or any of the other crimes which defining bribery in the old Penal Law nor is the phrase found in any other Section. The Section of the old Penal Law spoke of an offer with intent to influence another person so the crime of bribery there was predicated solely upon a unilateral statement or unilateral behavior.

Furthermore, and as I said the phrase upon an "agreement or understanding" is not found. Furthermore, Section 200 warrants comparison with Section 100.05 of the Penal Law. The present section of the Penal Law which defines the crime of solicitation particularly the crime of solicitation in the second degree which is found in Section 100.05, a person is guilty of criminal solicitation in the second degree when with intent that another person engaged in conduct constituting a felony solicits, requests, commands

or importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the third degree has similar language in defining that degree. In this case undoubtedly there was a criminal solicitation in one degree or another as that crime is defined in the Penal Law, at least for a prima facie case. But the defendant wasn't indicted for the crime of solicitation in any degree. He was indicted for the felony of bribery.

The proof shows this and nothing more. That is that the defendant offered to pay an offer to a public servant of the City of New York $7,500 if the police would not take his friend before a Judge.

There is no evidence in the entire record before me which in any way, I pointed out before, which in any way established the agreement or understanding as required by statute an agreement or understanding by the police officer expressed by the police officer inferred from his behavior that he would take or not take any required action or would make any required decision. Certainly the unilateral offer on the defendant's part would fail under the criminal solicitation Section. But the offer by itself does not supply the requisites of the bribery Sections.

Criminal solicitation is not a lesser included crime under the heading of bribery and while the Penal Law, our new Penal Law, need not be constrictly construed and that's the language of Section 5, the provisions of the Penal Law must be construed according to the fair import of their terms to effect justice and promote the objects of the law. I will say in as much as the statute is ambiguous, it should not be interpreted to the detriment of the defendant. I remember cases in contract law and I suppose the same view might hold that where a person draws a particular document which is ambiguous, it is construed against the drawer, not the person who is purported to be affected by that. I only make that observation.

Decision on Trial Order of Dismissal

In conclusion, let me say if the Court finds no fault with the police in arresting the defendant and charging him with a crime. I do say there is error under these circumstances to charge the defendant with bribery rather than for the degree of the crime of solicitation. Under the circumstances, I hold that the prima facia case has not been made out and the indictment is dismissed.

The People have an exception on my ruling.

BRENDA C. BENJAMIN
Court Reporter

APPENDIX D

Appellate Division Opinion

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

First Department, May 15, 1975

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant

v.

KING BROWN,
Respondent.

APPEAL from an order of the Supreme Court at Trial Term (HAROLD BIRNS, J.), entered April 24, 1974 in New York County, granting a motion by defendant at the conclusion of the People's case to dismiss the indictment.

CAPOZZOLI, J. We are unanimous in holding that the appeal should be dismissed for the cogent reasons expressed in the opinion of Mr. Justice NUNEZ.

However, we do not agree with Mr. Justice NUNEZ that the trial court was correct in dismissing the indictment. In view of our disposition of the appeal, there is no need to pass upon the propriety of the action of the trial court in dismissing the indictment. If the appeal were not being dismissed, we would reverse. We believe the evidence was sufficient to spell out a prima facie case of bribery, as defined in section 200.00 of the Penal Law, and the motion to dismiss at the conclusion of the People's case should have been denied.

We read the section as making criminal the offer by a defendant to bribe a public servant. The Practice Com-

mentary (McKinney's Cons. Laws of N.Y., Book 39) to section 200.00 of the Penal Law in part reads: "It is substantially a restatement of the former law. Section 200.00 is directed at the *bribe giver*: a person who confers, or offers • • • to confer • • •. The gist of the crime of bribery is the *effort* to secure an impermissible advantage in the decision-making process of government." (Emphasis in original.) In this connection it is noteworthy that, under the former Penal Law, a bribery conviction on similar facts to those in the case at bar was affirmed. (*People* v. *Chapman*, 13 NY2d 97.) Since the dismissal of the indictment is not properly before us, we take no action with reference to same.

However, as above stated, the appeal of the People is unanimously dismissed.

NUNEZ, J. (concurring). Defendant Brown was indicted, charged with the crime of bribery as defined in section 200.00 of the Penal Law, in effect at the time the indictment was filed. At the conclusion of the People's case at the trial to the court and jury, the court granted defendant's motion to dismiss the indictment on the ground that a prima facie case had not been made out. CPL 290.10 provides that the court may issue a "trial order of dismissal" at the conclusion of the People's case or at the conclusion of all the evidence, upon the ground that the trial evidence is not legally sufficient to establish the offense charged. The People appeal pursuant to CPL 450.20 (subd 2) providing that the People may, as of right, appeal from such a trial order of dismissal.

The indictment specifically alleged that on February 20, 1973 the defendant offered a sum of money to a police officer "upon an agreement or understanding" (words of Penal Law, §200.00) that the officer's decision and exercise of discretion as a public servant would thereby be influenced. The court in a comprehensive opinion reviewing the evidence and applicable law granted the motion to dismiss on

the ground that the People failed to prove that the offer of money to the police officer was based upon an "agreement or understanding" that the officer's action would thereby be influenced. Concededly, the officer did not agree to accept the offer. On the contrary, he immediately notified his superior officer and induced the defendant to repeat the offer after he, the police officer, had been provided with a recording device to obtain the necessary evidence of defendant's offer to bribe him.

Fong Foo v. *United States* (369 US 141) involved a trial not completed where the Trial Judge directed a verdict for the defendants on the ground of prosecutorial improprieties and lack of credibility of Government witnesses. The Court of Appeals had held that the Trial Judge had no power to direct an acquittal on the record before it. The Supreme Court reversed, though the Court of Appeals "thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation" (*id.*, p. 143). In the present case, as in *Fong Foo*, the ruling of the trial court is based in part on the evidence adduced at the trial and in part on the court's interpretation of the law.

It should be noted that the Government is given a most liberal right of appeal.* Nevetheless, the Supreme Court has repeatedly struck down Government appeals from rulings favorable to defendants as violative of the Fifth Amendment. In *United States* v. *Jenkins* (420 US 358), the respondent Jenkins was indicted for failing to enlist in the armed forces. After a bench trial the District Court dismissed the indictment and discharged Jenkins. The Government appealed the District Court's ruling but the Second

* Section 3731 of title 18 of the United States Code (1970) provides, in relevant part: "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Circuit dismissed the appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution." (490 F2d 868, 880.) The Supreme Court affirmed. It reasoned (p. 370); "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 USC §3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause". The court quoted from *Green* v. *United States* (355 US 184, 187): "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity".

We read *United States* v. *Jenkins* (*supra*) and *United States* v. *Wilson* (420 US 332) as holding that only where there has been a jury verdict of guilty or findings by the court in a nonjury trial to support a verdict of guilty, but the trial court in either case then finds in the defendant's favor on a question of law, will appeal be permitted. In such case the Double Jeopardy Clause does not bar an appeal because errors of law may be corrected and the guilty verdict reinstated without another trial.

In this case, since there has not been a verdict of guilty or a finding of facts sufficient to support the defendant's guilt, a successful appeal by the People would result in a second trial in violation of the operative principle of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and section 6 of article I of the Constitution of the State of New York. For the foregoing reasons the appeal is dismissed.

The appeal from the order of the Supreme Court, New York County (Birns, J.) entered on April 24, 1974 should be dismissed.

Speaking only for myself, if we were not dismissing the appeal and reached the merits, I would affirm the order appealed from on the comprehensive and well-reasoned opinion of Mr. Justice Birns. Reliance by the majority on *People* v. *Chapman* (13 NY2d 97) is misplaced. *Chapman,* decided under the old law, sheds no light whatsoever on the interpretation of the present bribery definition (Penal Law, §200.00) which requires "an agreement or understanding" that the officer's decision and exercise of discretion as a public servant would thereby be influenced. These are the plain words of the statute. No commentary can change them.

Stevens, P.J., Markewich and Lupiano, JJ., concur with Capozzoli, J.; Nunez, J., concurs in a separate opinion.

Appeal from order, Supreme Court, New York County, entered on April 24, 1974, unanimously dismissed.

APPENDIX E

Court of Appeals Opinion

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

KING BROWN,
Respondent.

Decided June 17, 1976

JONES, J.:

We now hold that section 450.20(2) of the Criminal Procedure Law providing that the People may appeal a trial order of dismissal entered pursuant to CPL §290.10 is unconstitutional as violative of the right not to be placed twice in jeopardy for the same offense (N.Y.S. Constit., Art. I, §6; U.S. Constit., Amend. V) if "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." (*United States* v. *Jenkins*, 420 US 358, 370).

We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman*, 35 NY2d 158, mot to amd rem granted

Court of Appeals Opinion

35 NY2d 853). Subsequent to our decision in *Fellman*, however, the United States Supreme Court decided three cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson*, 420 US 332, and *United States* v. *Jenkins*, 420 US 358, decided February 25, 1975, and *Serfass* v. *United States*, 420 US 377, decided less than a week later on March 3, 1975).[1] We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary in *People* v. *Fellman*, 35 NY2d 158, *supra*.

In this case defendant was charged in a one count indictment with having committed the crime of bribery as defined in Penal Law §200.00 which at the time of indictment provided:

> A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's * * * judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

At defendant's trial the People presented proof that, following the arrest of one Angel Rodriguez, defendant appeared at the local precinct station house and offered Rodriguez's arresting officer money in return for the release of Rodriguez. Following dilatory tactics, the arresting officer succeeded in having defendant repeat the bribe offer in the presence of another officer while a tape-recorder recorded the incriminating conversation.

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1. Both the First Department in the present case (48 AD2d 95) and the Fourth Department in *People* v. *Gesegnet* (47 AD2d 333) have concluded in the light of the recent Supreme Court trilogy, that *Fellman* is no longer controlling and that CPL §450.20(2) is unconstitutional. The Second Department has reached a contrary conclusion in *People* v. *Brooks* (50 AD2d 319).

At the conclusion of the People's case-in-chief, defendant moved pursuant to CPL §290.10[2] for a trial order of dismissal on the ground that a prima facie case of his guilt of bribery had not been made out. Defendant argued that the statute under which he had been indicted included as an element of the crime an "agreement or understanding" shared by the public servant sought to be influenced as well as by the bribe offeror and that the People had failed to establish a prima facie case because of insufficiency of proof as to this element. The prosecutor agreed that no evidence had been introduced to show that the police officer had entered into a corrupt agreement or understanding but argued that the statute did not require such a showing. Under the prosecutor's analysis, the statutory term "agreement or understanding" referred only to the defendant's state of mind and not to the state of mind of both the defendant and the public servant.

There was thus presented to the trial court a pure question of law, namely, what constitutes the crime of bribery? The court concluded that the "phrase [agreement or understanding] embraces an exchange of promises by both persons or a mutual understanding that in return for the benefit or money offered to the public servant—the offeree—that person will take or will not take certain action or would make or not make a certain decision." Since the People had offered no proof of such an agreement or mutual understanding, the court granted defendant's motion and entered a trial order of dismissal.

2. CPL §290.10 provides in pertinent part:

> 1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.
>
> 2. Despite the lack of legally sufficient trial evidence in support of a count of an indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

Pursuant to CPL §450.20(2)[3] the People took an appeal to the Appellate Division. Less than 10 days before argument of that appeal, the United States Supreme Court handed down its decision in *United States* v. *Wilson* (420 US 332, *supra*) and in *United States* v. *Jenkins* (420 US 358, *supra*) establishing the principles by which it is to be determined in what circumstances the government may appeal from an adverse ruling in a criminal trial without violating a defendant's right not to be placed twice in jeopardy for the same offense. Relying on those decisions, the Appellate Division unanimously dismissed the appeal by the People on its analysis that, if the People were to prevail on appeal, a new trial would be required and that a second trial would violate defendant's rights under the federal double jeopardy clause.[4] The Court stated its reasons as follows:

> "We read [*Jenkins* and *Wilson*] as holding that only where there has been a jury verdict of guilty or findings by the court in a nonjury trial to support a verdict of guilty, but the trial court in either case then finds in the defendant's favor on a question of

3. CPL §450.20(2) provides that the People may take an appeal as of right to an intermediate appellate court from a trial order of dismissal entered pursuant to CPL §290.10. For the legislative history underlying this provision see *People* v. *Sabella* (35 NY2d 158, 164-165).

4. In dictum, four of the five justices at the Appellate Division indicated that, had they reached the merits of the case before them, they would have concluded that the People had made out a prima facie case of bribery; under their interpretation of Penal Law §200.00 there was no requirement that the People prove that the police officer to whom the bribe was offered agreed or understood that his decision or exercise of discretion would thereby be influenced.

Because our jurisdiction on this appeal extends only to the correctness of the dismissal of the appeal at the Appellate Division (CPL §470.60[3]) and because of our disposition of this appeal, we express no view as to the correctness of the trial court's interpretation of Penal Law §200.00 on which the trial order of dismissal was predicated.

law, will appeal be permitted. In such case the Double Jeopardy Clause does not bar an appeal because errors of law may be corrected and the guilty verdict reinstated without another trial." (48 AD 2d at 98.)

On the present appeal, the People argue that the Appellate Division incorrectly distilled from the *Jenkins* and *Wilson* decisions that the only relevant consideration in determining whether the government may appeal from an unfavorable criminal trial ruling is whether, if such appeal should prove successful, the defendant would be required to stand retrial. The People urge that whether a new trial will be required should be viewed as only one of two factors to be considered; of equal importance, it is urged, is whether the trial court's order was an "acquittal" or otherwise based on factual findings "favorable" to the defendant. While there is much in logic to support such an analysis (cf. *People* v. *Sabella*, 35 NY2d 158, *supra;* Government Appeals of "Dismissals" in Criminal Cases, 87 Harv L Rev 1822, 1837-1841; Twice in Jeopardy, 75 Yale L Jnl 262), we conclude that the Supreme Court by its recent trilogy of double jeopardy cases has expressly rejected any such analysis and has interpreted the federal double jeopardy clause exactly as did the court below. As that clause, found in the federal constitution, is binding on the states (*Benton* v. *Maryland*, 395 US 784), we accordingly are constrained to conclude that the order at the Appellate Division dismissing the appeal to that Court must now be affirmed.

Analysis of the limits imposed by the double jeopardy clause on the availability to the prosecution of appeals from trial orders of dismissal necessarily turns on ascertaining the purpose which that clause may be said to effectuate. "Since the prohibition in the Constitution against double jeopardy is derived from history, its sig-

nificance and scope must be determined, 'not simply by taking the words and a dictionary, but by considering [its] • • • origin and the line of [its] • • • growth'." (*Green* v. *United States*, 355 US 184, 199 [Frankfurter, J., dissenting].) It thus serves to recognize that the prohibition against being placed twice in jeopardy actually encompasses three prohibitions: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina* v. *Pearce*, 395 US 711, 717 [fns omitted].) Each "protection" serves different purposes and is surrounded by its own exceptions thereby complicating exposition of which rule attaches in different procedural situations. (For a critical analysis that "the judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies" and without scrutiny of these policies, see Twice in Jeopardy, 75 Yale L Jnl 262, *supra.*)

In the present case we are concerned with that function of double jeopardy which protects against retrial for the same offense following a previous acquittal thereon. In *United States* v. *Green*, 355 US 184, 187, *supra*, the Supreme Court analyzed the purposes and policies underlying this aspect of double jeopardy:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

(See also *United States* v. *Jorn*, 400 US 470, 479.) Thus the Supreme Court has identified two policies which underlie the prohibition against retrial following acquittal—prevention of harassment of criminal defendants and prevention of unjust convictions by subjection of defendants to repeated criminal trials until a factfinder may be found who will agree to convict. While both policies are equally expressive of the maxim at common law, *nemo debit bis vexari pro una et eadem causa* (no one should be twice vexed for one and the same cause), it readily appears that, depending on which policy is considered paramount, the question as to whether the double jeopardy clause permits to the government an appeal from a trial order of dismissal will result in different and even opposite answers. Thus if the policy underlying that clause is to prevent a defendant from suffering the "embarrassment, expense and ordeal" of a retrial should the government prevail on its appeal from a trial order of dismissal, then the answer can only be that such appeal is barred by the double jeopardy clause. If on the other hand the predominant purpose is to prevent unjust convictions secured after repetitive trials before successive triers of facts, then an appeal by the government from a trial order dismissing an indictment on a pure question of law (as in the present case) should not be barred by the double jeopardy clause. In the latter case, the question of a defendant's guilt would have been withdrawn from the trier of fact on the basis of a determination of law by the trial court and should such legal ruling be reversed on appeal and defendant required to stand retrial, there would be no enhanced probability of an unjust conviction secured through repeated prosecutions there having been no prior determination of factual innocence.

In the present case, the People argue that we should find as the controlling policy here to be applied the second policy or the prevention of unjust convictions. Such a contention is not without logic as support. The Supreme Court

has recognized in the context of premature termination of trials by declaration of mistrial that "the defendant's interest in proceeding to verdict [and thereby precluding a second trial] is outweighed by the competing and equally legitimate demand for public justice". (*Illinois* v. *Somerville*, 410 US 458, 471.) The "embarrassment, expense and ordeal" to a defendant whose first trial ended in a hung jury and who is forced to undergo retrial may be said to be equally as substantial as the harassment suffered by a defendant who, as in the present case, has yet to present any proof of his innocence. It is also argued that adoption of a rule permitting prosecution appeals only where no possibility could result therefrom that defendant would be required to undergo the ordeal of retrial appears to run counter to the Supreme Court's admonition that "we have disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause. *Illinois* v. *Somerville*, 410 US 458, 467." (*Serfass* v. *Wilson*, 420 US 377, *supra;* see also *United States* v. *Jorn*, 400 US 470, 480, *supra* [a "mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide"].) Thus, while we recognize that permitting the People to appeal trial orders dismissing an indictment on a pure question of law could be determined not to be in contravention of the policy protecting against the securing of unjust convictions and that the corollary policy of protecting against harassment of defendants could be found to be "outweighed by the competing and equally legitimate demand for public justice" (such analysis was fundamental to our holding in *People* v. *Fellman*, 35 NY2d 158, *supra*), we conclude that the recent Supreme Court trilogy of double jeopardy cases mandates a contrary holding. We turn then to an analysis of these cases.

In *United States* v. *Wilson*, 420 US 333, the defendant was tried for converting union funds to his own use, the jury entered a verdict of guilty, but on a post-verdict motion the trial court dismissed the indictment on the ground that defendant had been prejudiced by delay between offense and indictment. The government took an appeal to the Court of Appeals pursuant to U.S.C. tit 18, §3731,[5] but that Court held that the double jeopardy clause barred review of the trial court's ruling. In so holding, the Court of Appeals "reasoned that since the District Court had relied on facts brought out at trial in finding prejudice from the pre-indictment delay, its ruling was in effect an acquittal." (420 US at 335.) On appeal to the Supreme Court the Government argued that "the constitutional restriction on governmental appeals is *intended solely to protect against exposing the defendant to multiple trials*, not to shield every determination favorable to the defendant from appellate review. Since a new trial would not be necessary where the trier of fact has returned a verdict of guilty, the Government [argued] that it should be permitted to appeal from any adverse post-verdict ruling." (*Ibid.*; emphasis supplied.) In reversing the order of dismissal at the Court of Appeals, the Supreme Court adopted the Government's arguments and held "that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense * * *" (420 US at 336.) The Court's holding was supported entirely by its analysis of the policies underlying the double jeopardy clause (420 US at 339-342; for further analysis of

5. That section provides in relevant part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

such policies see Twice in Jeopardy, 75 Yale L Jnl 262, *supra*). On the basis of such analysis, the Court focused "on the prohibition against multiple trials as the *controlling* constitutional principle" (420 US at 346; emphasis supplied). Thus the Court concluded that "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended" and that, in the case before it "[s]ince reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution." (420 US at 344-345.)

While Wilson involved the constitutionality of prosecution appeals from trial court orders dismissing indictments following a verdict of guilty (and thus is instructive to the present case only in the analysis there engaged in by the Court), in *United States* v. *Jenkins* (420 US 358, *supra*) the Court was confronted with a government appeal from a trial order which dismissed the indictment following a bench trial but prior to the trial court's finding of facts on all elements of the crime charged. Thus the procedural posture of the appeal scrutinized in *Jenkins* may be said to be comparable to that here under review. In *Jenkins* the prosecution argued that, while appellate reversal of the trial court's order dismissing the indictment would require defendant to stand retrial, such retrial would not be in violation of double jeopardy principles since the trial order of dismissal was not grounded in factual determinations favorable to the defendant. The Court rejected that argument and held that the appeal was barred by the double jeopardy clause:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. *But it is enough for purposes of the Double Jeopardy Clause*, and there-

fore for the determination of appealability under 18 U. S. C. §3731, *that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.* Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. *The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor.* To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity • • •.' *Green* v. *United States, supra,* at 187." (420 US 369-379; emphasis supplied.)[6]

It may be asserted, and accurately, that in *Jenkins* the Supreme Court was confronted with a judgment discharging the defendant as to which it could not be said "with assurance whether it was, or was not, a resolution of the factual issues against the Government". (420 US at 369-370.) It was open to the Court in such circumstance to fashion a different rationale for the decision it made. The Court could easily have held that where the dismissal was not on

6. We consider it to be at least of some significance that in its quotation from *Green* as to the policy underlying the double jeopardy clause, the Court chose to include only the reference to preventing harassment of criminal defendants and excised the reference to prevention of unjust convictions (for full quotation of language in *Green* see p. 6, *supra*).

the law, i.e., where it was clearly on the facts or where it could not accurately be determined whether it was on the facts or the law, double jeopardy would preclude appeal. Consistently the Court could then have held that when the dismissal was clearly on the law alone there would be no double jeopardy bar. (Cf. *People* v. *Sabella,* 35 NY2d 158, *supra.*) But most significantly this rationale was not chosen as the basis of the Court's decision; on the contrary the touchstone was explicitly described as whether "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 US at 370).

In the third of the trilogy of cases, *Serfass* v. *United States* (420 US 377), the Court was confronted with an appeal from a pretrial order dismissing an indictment based on a legal ruling made by the trial court after its examination of records and an affidavit setting forth evidence to be adduced at trial. Conceding that "formal or technical jeopardy had not attached" at the time when the order dismissing the indictment had been entered, the defendant nevertheless argued in the Supreme Court that, because the pretrial ruling was based on evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial, the ruling was the functional equivalent of an acquittal on the merits and accordingly that the policies of the double jeopardy clause would in fact be frustrated by further prosecution (420 U.S. at 389-390). The Supreme Court rejected that argument and in so doing stressed the importance of "the procedural context" in which the order dismissing the indictment was entered (420 US at 392). Thus the Court concluded that even if the order of dismissal might be characterized as an acquittal in a generic sense, such order "has no significance in this context unless jeopardy has once attached • • •." (*Ibid.*)

On the basis of these three cases we conclude that the Supreme Court has formulated a double jeopardy rule—albeit what may be characterized as a mechanical rule—which precludes the People from taking an appeal from an adverse trial ruling whenever such appeal if resolved favorably for the People might require the defendant to stand retrial—or even if it would then be necessary for the trial court "to make supplemental findings" (*United States* v. *Jenkins*, 420 US at 370, *supra*). Double jeopardy principles will bar appeal unless there is available a determination of guilt which without more may be reinstated in the event of a reversal and remand. Application of such rule to the provisions of CPL §450.20(2) permitting the People to appeal from a trial order of dismissal renders that section unconstitutional except in the instance where disposition of the motion is reserved until after the jury verdict has been returned.

The People argue that the purpose of the double jeopardy clause is to preserve for the defendant "acquittals" or "favorable" factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations. Thus the People contend that double jeopardy plays no role in the present case where all factual conclusions were made favorably to the People and where dismissal was predicated solely on an erroneous conclusion by the trial court as to the issue of law.

In the light of the Supreme Court trilogy of cases, the People's argument must fail. At the outset the argument ignores what that Court termed the "controlling constitutional principle" in the context of application of double jeopardy principles to appeals by the government—"prohibition against multiple trials". (*Wilson*, 420 US at 345-346, *supra*.) In *Jenkins* the Court left no doubt that the touchstone in the resolution of whether such appeals may be permitted is whether retrial—or even supplemental fact-findings—would be necessitated by a successful government

appeal. The People's argument that whether retrial might follow a successful government appeal should be viewed as only one of two equally important factors is identical to the argument propounded by the government in *Jenkins* (see 420 US at 368) and was expressly rejected by that court (420 US at 369).

More significant, the Supreme Court has left no doubt that whether the trial court's order of dismissal was or was not grounded in factual determinations is immaterial to whether such dismissal may be appealed by the government. In *Wlison* the order sought to be appealed was predicated entirely on factual determinations which were adduced from evidence presented at trial. An appeal by the government was nontheless permitted. In *Jenkins* the Court could not have been more explicit in making it clear that the legal-factual dichotomy plays no role and that the concern of the double jeopardy clause extends no further than to the question whether retrial might follow a successful prosecution appeal (420 US at 370). It is instructive to note that when *Jenkins* was decided in the Court of Appeals, Judge Lumbard wrote a dissenting opinion grounded very much in the legal factual dichotomy propounded herein by the People (490 F2d 868, 880-885). In its opinion the Supreme Court expressly rejected the analysis proposed by Judge Lumbard (420 US at 365, fn. 7).[7]

The People further propose that the issue herein presented may be analogized to the issue presented by the case which, on a jury's inability to reach a verdict, terminates prematurely in a declaration of mistrial and as to which the

7. We cannot read Mr. Chief Justice Berger's language in his opinion in *Serfass* which focused the Court's holding in that case on the critical circumstance that jeopardy had not there attached—"we of course express no opinion on the question as to whether a similar ruling by the District Court after jeopardy had attached would have been appealable" (420 US at 394)—as designed significantly to cut back, or to signal a cut-back, in the decision in *Jenkins*, handed down but six days previously.

double jeopardy clause poses no bar to retrial (*United States* v. *Perez*, 22 US [9 Wheat] 579). (It was on the basis of exactly this analogy that the Appellate Division, Second Department, concluded in *People* v. *Brooks*, 50 AD2d 319, *supra*, that the *Wilson, Jenkins* and *Serfass* decisions do not require departure from our holding in *People* v. *Sabella*, 35 NY2d 158, *supra*). In the *Jenkins* decision, however, the Court expressly rejected this analysis, finding it "of critical importance" that in the hung jury line of cases the trial ended in a mistrial (not a determination "favorable" to any party) whereas in the present type of case trial terminates in an order dismissing the charges at issue (clearly a determination "favorable" to defendant). (420 US at 365, fn. 7.)

We note in passing that in the present case had there been no application for a trial order of dismissal or had the trial court chosen not to exercise his discretion in terminating the trial on the basis of his legal conclusion as to what elements constitute the crime of bribery, this case would undoubtedly have proceeded to the jury under a charge which would have included the trial court's interpretation of the bribery statute. In that event, since the People concededly had offered no proof on what the trial court would then have charged was a third element of the crime of bribery, the jury almost to a certainty would have acquitted this defendant, and it cannot be doubted that no appeal by the People would have lain from such acquittal (*Kepner* v. *United States*, 195 US 100, 130; *United States* v. *Ball*, 163 US 662, 671).

In sum we conclude that the issue presented in this case is directly controlled by the analysis articulated by the Supreme Court in the *Wilson, Jenkins* and *Serfass* decisions and, in particular, by the *ratio decidendi* in *Jenkins*. The inescapable rule which the Supreme Court has fashioned in these cases is that the double jeopardy clause pre-

cludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from appellate reversal of the order sought to be appealed. It necessarily follows that in such instances CPL §450.20(2) cannot stand since it permits exactly that appeal which the Supreme Court has declared the double jeopardy clause will not tolerate.

It is worth adding that to characterize a rule of law as "mechanical" is not always to denigrate the rule. Any rule the application of which forecloses considerations of fairness and equity peculiar to the individual case must be regarded with particular attention and care. On the other hand there is great merit to a proper categorical rule which is easy of application and susceptible of reliable prediction. So it is with the double jeopardy rule formulated by the Supreme Court. Nor may this rule be expected to frustrate the "public's interest in fair trials designed to end in just judgments". (*Wade* v. *Hunter*, 336 US 684, 689.) While some difficulties may be encountered in cases now in the appellate process, the Appellate Divisions in two Departments have previously adopted what we, too, conclude is the rule of the Supreme Court. As to cases in the future, no great problems should be anticipated. In exercising his responsible discretion in deciding whether to grant a motion for a trial order of dismissal, the trial judge must now be aware that the consequence of granting such a motion prior to the return of the jury verdict will be to foreclose appeal by the prosecution. This is not to say that the granting of such a motion prior to verdict may not be fully warranted; it is to say that our decision introduces another consideration to be weighed in the disposition of an application for a trial order of dismissal.

For the reasons stated, the order of the Appellate Division should be affirmed.

BREITEL, Ch. J. (dissenting):

I dissent and vote to reverse and reinstate the appeal in the Appellate Division and remit to that court for further proceedings.

The Appellate Division misconstrued and therefore misapplied the holdings in *United States* v. *Jenkins* (420 US 358) and in *United States* v. *Wilson* (420 US 332). Those holdings stand for the proposition that whenever a criminal charge has been dismissed, in whatever way, after a fact-finding consideration of any of the elements of fact involved in the charge, there may not be a new trial on that charge. It makes no difference, after jeopardy has attached, at what stage in the trial, jury or non-jury, the consideration of the factual element occurred which resulted in the dismissal of the charge. Moreover, it is enough that the appellate court cannot say with assurance whether there was a resolution of any of the factual issues against the prosecution. A reading of *United States* v. *Jenkins* (*supra*), at pp. 368-370) supports the above analysis. It does not extend to the situation where it is clear beyond doubt that no factual issue has been resolved in favor of defendant on the trial. In such case the suggestion in *Serfass* v. *United States* (420 US 377, 394) is applicable, namely, that a trial interrupted by defendant's motion to dismiss on a pure question of law and the erroneous granting of such motion does not necessarily bar a retrial. Notably, the *Serfass* case was decided a week later than the *Jenkins* case.

There is no dispute concerning what occurred at the trial in this case. Notably, this was a jury trial and not a non-jury trial as was involved in the *Jenkins* case. The People gave proof that defendant King Brown offered money to

police to obtain the release from arrest of one Angel Rodriguez. Rodriguez had been arrested for possession of a stolen automobile. Immediately after the presentation of the People's case the trial court dismissed the indictment, on defendant's motion, on the ground that the People had failed to submit proof of an element of the crime of bribery. The trial court held that there was no proof whether any public officer had agreed or understood that his decision or exercise of discretion would be influenced by the offer of money. The People appealed.

Although a majority of the Appellate Division concluded that the trial court was in error as a matter of law in so holding, it nevertheless dismissed the appeal. It did so because the Appellate Division correctly observed that the crime of bribery did not require any agreement or understanding to accept a bribe for the purpose for which it had been offered.

The Appellate Division believed it was constrained, however, by the holdings in the *Jenkins* and *Wilson* cases (*supra*), on the view that double jeopardy had attached and that therefore a retrial of defendant would be barred. They indicated this view by their concurrence in part with the opinion of Mr. Justice Nunez who read the *Jenkins* and *Wilson* cases to require that a retrial, as well as an appeal, is prohibited unless there has been a finding by jury or bench at the trial level in favor of guilt by the defendant. Of course, if there had been a verdict of guilt, but set aside erroneously as a matter of law, correction of the error at the appellate level would not require a retrial, because the verdict or judgment could be reinstated (*United States* v. *Wilson*, 420 US 332, 352-353, *supra*). So Mr. Justice Nunez stated in his opinion: "since there has not been a verdict of guilty or a finding of facts sufficient to support the defendant's guilt, a successful appeal by the People would result in a second trial in violation of the operative principles of the Double Jeopardy Clause."

In so concluding, the Appellate Division has misapplied the cited cases. To recapitulate, the United States Supreme Court has held that where a judge, in terminating a non-jury trial, possibly made a finding of fact favorable to the defendant, no further proceeding was constitutionally permissible. For double jeopardy purposes, a termination of trial where it is unclear whether the basis was entirely or in some measure based upon a finding of fact, there is an acquittal as a matter of constitutional law, however the acquittal may be denominated.

In this case, however, there was not the slightest suggestion by the trial court that any of the People's proof was wanting in weight or credibility but instead the indictment was dismissed before anything had been submitted or considered by the fact-finders solely on a pure question of law. Since the jury never received the issues of fact there was never any possibility that a determination by the jury in favor of defendant had been made by them. Had the trial court in dismissing the indictment as a matter of law weighed any one or more of the elements of fact in the case, then the Double Jeopardy Clause applied and a retrial would be prohibited. Hence, the rule in the *Jenkins* case is inapplicable, because neither judge nor jury had passed on any issue of fact.

It is not true that in any case where a jury has been empaneled or proof has been taken which does not result in a finding of guilt that there is automatic double jeopardy. As the Court held in *Illinois* v. *Somerville* (410 US 458, 467) and reaffirmed in *Serfass* v. *United States,* (420 US 377, 390, *supra*): "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." If the termination of the trial is due to some "manifest necessity", such as the death of the judge, or because the termination is made on application of the defendant addressed to a pure

question of law, there is no double jeopardy, although jeopardy attached at the beginning of the trial (see *Illinois* v. *Somerville, supra,* at p. 468). In the case where the termination is by defendant's motion or at his instance the termination is his "fault" (see *United States* v. *Kehoe,* 516 F2d 78, 86; cf., *United States* v. *Tateo,* 377 US 463, 467). If, on the other hand, the termination is due to the "fault" of the prosecution, a retrial is prohibited under historical and current double jeopardy principles.

Accordingly, I dissent and vote to reverse and reinstate the appeal of the People in the Appellate Division and to remit the proceedings to that court.

• • •

Order affirmed. Opinion by Jones, J. All concur except Breitel, Ch.J., who dissents and votes to reverse in an opinion in which Jasen, J., concurs.

APPENDIX F

Order of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 15, 1975.

Present—

Hon. HAROLD A. STEVENS, Presiding Justice,
ARTHUR MARKEWICH
VINCENT A. LUPIANO,
LOUIS J. CAPOZZOLI,
EMILIO NUNEZ, Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

KING BROWN,
Defendant-Respondent.

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, New York County (BIRNS, J.), entered on April 24, 1974, dismissing the indictment against defendant, and said appeal having been argued by Mr. Hugh Anthony Levine of counsel for the appellant, and by Ms. Susan E. Hofkin of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the appeal be and the same is hereby dismissed. [NUNEZ, J. concurs in an Opinion].

ENTER:

HYMAN W. GAMSO

APPENDIX G

Court of Appeals Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

KING BROWN,
Respondent.

The appellant in the above entitled appeal appeared by Robert M. Morgenthau, District Attorney, New York County; the respondent appeared by William Hellerstein/ William J. Gallagher.

The Court, after due deliberation, orders and adjudges that the order appealed from is affirmed. Opinion by Jones, J. All concur except Breitel, Ch.J. who dissents and votes to reverse in an opinion in which Jasen, J. concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals as entered in Minutes of Causes, Court of Appeals, Vol. 36, p. 417.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, August 6, 1976.

nunc pro tunc June 17, 1976

IN THE

Supreme Court of the United States

October Term, 1976

No. 358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

KING BROWN,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

MOTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI AND TO SET THE ARGUMENT IN THIS CASE IN TANDEM WITH THAT IN *UNITED STATES* v. *MARTIN LINEN SUPPLY CO.* (No. 76-120, CERT. GRANTED NOV. 1, 1976)

ROBERT M. MORGENTHAU
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IN THE

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The petitioner herein respectfully moves this Court for an order (1) granting the petition for a writ of certiorari, and (2) setting the argument in this case in tandem with that in *United States* v. *Martin Linen Supply Co.* (No. 76-120, cert. granted Nov. 1, 1976). As grounds for this motion the petitioner states:

The petition in this case presents the issue of when, if ever, a prosecutor may appeal after an indictment is dismissed upon a defendant's motion in the midst of trial. In

his memorandum supporting our petition, the Solicitor General has said that this issue "is currently the most important unresolved problem in the interpretation of the Double Jeopardy Clause." (Memorandum for the United States as Amicus Curiae, p. 2). On November 1, 1976 the Court granted a writ of certiorari in a case which may be thought to present a similar issue. *United States* v. *Martin Linen Supply Co.*, No. 76-120. The Court has not yet acted on the instant petition, and it may be that the Court is considering postponing any action on this petition until *Martin Linen* is decided. We respectfully urge the Court not to do so. In several respects *Martin Linen* is different from this case, and it is very possible that *Martin Linen* will be decided on a narrow ground not related to the important issue raised in this case. In any event, even if the Court does reach the broader issue in *Martin Linen*, we suggest that a resolution of that issue will be helped by considering the two cases together.

1. In *Martin Linen*, the jury could not agree upon a verdict, so the trial judge declared a mistrial, after which he entered a "judgment of acquittal" pursuant to F. R. Crim. P. 29 (c). In its petition to this Court, the Government urged that, in these circumstances, an appeal by the prosecutor is permissible because the judgment was entered by the trial judge not in the midst of trial but after the first trial had ended in a mistrial, in other words, at a time when the Government clearly had a right to retry the defendant. *See United States* v. *Perez*, 9 Wheat. 579 (1824). This Court has accepted a similar argument in *United States* v. *Sanford*, No. 75-1867, decided Oct. 12, 1976. The argument has no application in the case because here

there was no mistrial before the judge dismissed the indictment.

If the Court does decide *Martin Linen* on the narrow ground urged by the Government, then that decision will likely have no bearing on the broader and more difficult question raised in this case—whether a prosecutor may appeal after a judgment dismissing an indictment in the midst of a jury trial. Little, then, will be gained by postponing decision here; and much will be lost. Resolution of the issue raised in this case will be postponed at least until early 1978. In the meantime, the more than sixty state and local prosecutors in New York will have been precluded from appealing in circumstances authorized by the state legislature. Prosecutors, defendants, and judges in twenty-eight other jurisdictions will be left in doubt about the permissibility of state appeals in similar circumstances. (*See*, Petition, pp. 25-28).

2. If the Court rejects the narrow ground urged by the Government in *Martin Linen*, then that case will present a much broader issue—whether the Government may appeal if a court in a jury trial enters a judgment after jeopardy has attached but before any jury has determined the defendant's guilt or innocence. Even though the instant case also presents a similar issue, still there are differences between the two cases. In *Martin Linen* the trial court entered a "judgment of acquittal"; in this case, there was no "acquittal" either in name or in fact. In *Martin Linen*, the trial court's judgment was based on its view that evidence presented at the first trial was not sufficient to convict the defendant; in this case the judgment entered by the trial judge was based entirely on an erroneous legal conclusion about the meaning of a statute that defined the

crime of bribery. In *Martin Linen*, the defendant could not have sought before trial the relief it ultimately obtained; in this case, the defendant could have moved before trial for the same relief he later sought and got in the midst of trial. We cannot predict, of course, whether this Court will find any of these differences significant. However, we respectfully suggest that a comparison of the judgments entered by the trial courts in these two cases and a comparison of the circumstances in which they were entered will illuminate the general principles governing the state's right to appeal from judgments entered by trial courts during jury trials. Moreover, the interests of judicial economy will be served if the Court hears these cases at the same time instead of two times more than a year apart.

Conclusion

The petition for a writ of certiorari should be granted, and the case should be set for argument in tandem with* United States v. Martin Linen Supply Co. *(No. 76-120, cert. granted November 1, 1976).

Respectfully submitted,

ROBERT M. MORGENTHAU
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Attorney for Petitioner
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(212) 732-7300

By: PETER L. ZIMROTH

PETER L. ZIMROTH
Assistant District Attorney

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

KING BROWN,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

KING BROWN,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

In the court below(and in our petition for a writ of certiorari) we urged a two-step analysis in determining whether, under the Double Jeopardy Clause, a prosecutor may appeal in cases such as this. First, the court must determine whether a successful government appeal would require a new trial. If so, then the court must determine whether the ruling appealed from was an "acquittal". The court below rejected our argument and held instead that there was only one consideration in determining whether

the state could appeal in this case—whether a successful appeal would require a new trial. Therefore, although agreeing that there had been no acquittal in this case, the Court of Appeals nonetheless affirmed the dismissal of the People's appeal.

In the recent case of *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, this Court appears to have accepted the analysis rejected by the court below. Since a successful government appeal in *Martin Linen* obviously would have required a second trial, the Court went on to determine whether the judgment appealed from was an "acquittal". This Court held that under Rule 29 of the Federal Rules of Criminal Procedure, the trial judge had the power to acquit and that he had, in fact, done so. The trial court had entered "valid judgments of acquittal * * * on the express authority of, and strictly in compliance with, Rule 29(c)." *United States* v. *Martin Linen Supply Co., supra*, slip op. at 6.

This case is entirely different. The New York legislature has not given trial judges the power to acquit defendants in the midst of trial. Indeed, in 1972, the state legislature amended the Criminal Procedure Law to make clear its intention that the trial judge's powers be limited to dismissing counts of an indictment based on legal issues alone. The purpose of the change was to allow the People to appeal from such dismissals. (See Petn. at 8-11.) Moreover, in the instant case, there can be no argument that the trial judge acquitted the defendant even though unauthorized to do so. The judge's "dismissal" was based entirely on his (erroneous) legal conclusion about what constituted the elements of the offense of bribery. (*See* Petn. at 4-7,

22-23, n.11.) There was no acquittal because there was no resolution whatever "of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co., supra*, slip op. at 7.

We do not believe much would be gained by remanding this case for the New York Court of Appeals to express a view about whether there had been an acquittal in this case. The opinion below already makes it clear enough that in that Court's view there had been no acquittal. The Court of Appeals stated the issue before the trial judge as follows: "There was thus presented to the trial court a pure question of law, namely, what constitutes the crime of bribery?" (Petn. at 16a.) Later, the Court said that the trial judge had dismissed the indictment in this case based "on a pure question of law" (Petn. at 20a; see also Petn. at 21a, 26a.) In dissent, Judge Breitel also concluded that it was "clear beyond a doubt that no factual issue has been resolved in favor of defendant on the trial." (Petn. at 30a.)

Conclusion

For these reasons, and for the reasons expressed in the prior submissions to the Court, the writ of certiorari should be granted.

Respectfully submitted,

Robert M. Morgenthau
District Attorney
New York County

Peter L. Zimroth
Robert M. Pitler
Assistant District Attorneys
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

KING BROWN,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent herein respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. Counsel's affidavit in support of the within application is annexed hereto.

Dated: September 22, 1976
New York, New York

Respectfully submitted,

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15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorney for Respondent

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM E. HELLERSTEIN, being duly sworn, deposes and says:

I have represented respondent throughout the prior proceedings in the courtsof New York and make this affidavit in support of the within application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

Respondent, King Brown, has declined to execute an affidavit attesting to his indigency for reasons unrelated to a change in his financial status. He is presently at the Rikers Island (N.Y.) House of Detention, awaiting sentencing on another charge.

As his counsel below, it is my firm belief that the People's petition for a writ of certiorari requires a response. That respondent has declined to execute an affidavit should not require this office to incur the costs of printing our brief in opposition. We have no basis for concluding that respondent's financial situation has improved since the entry of the judgment of the New York Court of Appeals.

WHEREFORE, it is respectfully requested that the application for leave to proceed in forma pauperis be granted.

William E. Hellerstein
WILLIAM E. HELLERSTEIN

Sworn to before me this
19th day of September, 1976.

Allen E. Burns
ALLEN E. BURNS
Notary Public, State of New York
No. 31-5536040
Qualified in New York County
Commission Expires March 30 1977

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,
-against-
KING BROWN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1976

NO. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

KING BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix E of the Petition) is not yet officially reported. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department (Appendix D of the Petition) is reported at 48 A.D. 2d 95, 368 N.Y.S. 2d 171 (1975). The opinion of the Hon. Harold Birns, a Justice of the Supreme Court of the State of New York, New York County (Appendix C of the Petition) is not officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.*

*We would note, however, that the New York Court of Appeals' decision specifically adverted to the double jeopardy clause of the New York State Constitution (Art. 1, §6). Given the court's extensive discussion of United States v. Wilson, 420 U.S. 332 (1975), United States v. Jenkins, 420 U.S. 358 (1975), and Serfass v. United States, 420 U.S. 377 (1975), we do not feel equipped to argue that the judgment below rests upon an independent and adequate state ground. Nonetheless, we feel obligated to alert this Court to the reference to the state Constitution. See California v. Krivda, 409 U.S. 33 (1972).

QUESTION PRESENTED

Whether the double jeopardy clause of the federal Constitution bars the state from appealing a trial judge's pre-verdict order granting the defendant's timely and necessary motion to dismiss the indictment for failure of the prosecution to prove a prima facie case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, the following provision of Art. 1, §6 of the New York Constitution is involved:

> No person shall be subject to be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

By a felony complaint, respondent was charged with bribery under P.L. (former) §200.00,* and a preliminary hearing was held on February 21, 1973 before the Hon. Milton Samorodin, a judge of the Criminal Court of the City of New York, New York County. At the hearing, police officer Timothy Stewart asserted that on February 20, 1973 respondent twice offered to give him money if he would release from custody a friend of respondent's. Prior to respondent's second offer, he asked Stewart "what are we going to do;" the officer answered, "that is up to you" (minutes of preliminary hearing, pages 10-13, annexed hereto as Appendix A). At the conclusion of the hearing defense counsel's motion to dismiss the charge on the ground of entrapment was denied, and the case was referred to the Grand Jury which indicted respondent on March 20, 1973.

Defense counsel again moved to dismiss the charge on April 1, 1974, claiming that the indictment was defective on its face and that respondent had been denied due process. On April 3, 1974 Mr. Justice Birns, who presided at the trial, denied the motion. The jury was then selected.

Officer Stewart's trial testimony was similar to that at the preliminary hearing, except that he did not recount his conversation with respondent which preceded the second offer of money.**

*The statute, set forth at page 4 of the Petition, was amended on September 1, 1973, becoming bribery in the second degree.

**Nor did the officer relate this conversation to the Grand Jury.

At the close of the People's case, defense counsel moved for a trial order of dismissal in accordance with C.P.L. §290.10(1), basing his argument on "certain things" that were stated during a discussion he and the prosecutor had with Mr. Justice Birns concerning the bribery statute. The judge then dismissed the indictment on the grounds urged by counsel, i.e. that a prima facie case of bribery had not been established because the "agreement or understanding" element of the crime required proof either that the officer agreed with respondent or led respondent to understand that the officer's conduct would be influenced upon receiving the money (trial minutes, pages 115-19, 121, annexed hereto as Appendix B).

Pursuant to C.P.L. §450.20(2)(which purports to authorize state appeals from trial orders of dismissal), the People attempted to appeal Mr. Justice Birns's order to the Supreme Court of the State of New York, Appellate Division, First Department. That court, relying on United States v. Wilson, 420 U.S. 332 (1975), and United States v. Jenkins, 420 U.S. 358 (1975), unanimously dismissed the appeal, holding that it was barred by the double jeopardy clauses of the federal and New York Constitutions. In dictum, four of the five justices expressed disagreement with Mr. Justice Birns's interpretation of the bribery statute. The fifth, Mr. Justice Nunez, opined that the trial court's interpretation was correct.*

The New York Court of Appeals, also relying on Wilson and Jenkins and, in addition, on Serfass v. United States, 420 U.S. 377 (1975), affirmed the Appellate Division's order and held C.P.L. §450.20(2) violative of the double jeopardy clause of both the federal and state Constitutions. The court of appeals expressly declined to rule on the correctness of Mr. Justice Birns's trial order of dismissal (Pet. App. at 17a). Nor did the court of appeals pass on the state's argument, raised for the first time in that court, that respondent purposely waited until jeopardy had attached to move for dismissal of the indictment for insufficient evidence.

*Prompted by Mr. Justice Nunez's approval of the propriety of the trial order of dismissal, the Advisory Committee on New York's Criminal Procedure Law has recommended that the "agreement or understanding" element of the bribery statute be amended to read "with the intent to influence." Fifth Annual Report to the Judicial Conference of the State of New York, pp. 42-4 (Jan. 9, 1976).

REASONS FOR DENYING THE WRIT

I. The decision below is correct.

The New York Court of Appeals affirmed the Appellate Division's dismissal of the People's appeal and held C.P.L. §450.20(2) violative of the state and federal Constitutions' double jeopardy clauses because, as in United States v. Jenkins, 420 U.S. 358, 370 (1975), "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (Pet. App. at 14a). Regardless of whether the court of appeals characterized its holding as based on a "mechanical rule", this "rule" did not, contrary to petitioner's argument (Pet. at 12-21), constitute novel double jeopardy law. Rather, the decision, which rested solely on the clause's prohibition against multiple prosecutions, was consonant with the analysis of United States v. Jenkins, supra, United States v. Wilson, 420 U.S. 332 (1975), and Serfass v. United States, 420 U.S. 377 (1975).

A.

Petitioner argues that before a prosecution appeal will be barred under the Wilson-Jenkins-Serfass trilogy, the multiple trial principle must be augmented by one of three additional factors, and that none of these extra factors was involved in this case. Petitioner asserts that these factors are: prosecutorial abuse at the first trial, a reason for terminating the first trial which did not defeat "the ends of justice," and, "most important", an acquittal on the merits at the first trial (Pet. at 13-7). Nothing in Wilson, Jenkins, or Serfass, however, supports this "extra factor test."

First, none of these cases involved an issue of prosecutorial misconduct. Second, in none did this Court even pause to evaluate whether the reasons for terminating the defendants' trials were proper. Indeed, the Court in Jenkins explicitly noted the irrelevancy of the correctness vel non of the district court's legal theory underlying the dismissal of the indictment. 420 U.S. at 365 n. 7.* Third, none of the cases involved an acquittal on the merits by the finder of fact: In Wilson, the defendant was convicted by the jury (420 U.S. at

*While petitioner assumes otherwise, Justice Birns's legal ruling in respondent's case has not been conclusively held erroneous.

333); in Jenkins, the district judge did not render a verdict of any sort (420 U.S. at 367); and in Serfass, jeopardy had not even attached (420 U.S. at 389).

Thus, without concrete support in Wilson, Jenkins, or Serfass for his "extra factor test," petitioner attaches significance to this Court's refusal to pass upon Wilson's contention that he was acquitted (Pet. at 18). By ascribing to an acquittal "talismanic quality", this argument does precisely what this Court cautioned against in Serfass. 420 U.S. at 392. The reason this Court did not consider Wilson's claim of acquittal is apparent: Acquittals bar retrial only if and solely because the double jeopardy clause's policy against multiple prosecutions would be offended--and this policy was not implicated in Wilson. 420 U.S. at 346-48.

Similarly, with Jenkins, petitioner suggests that there "might have been" an acquittal because of this Court's statements about the "uncertain" basis for the district judge's dismissal of the indictment (Pet. at 19-20). The "uncertainty", however, related only to the government's claim that Jenkins actually had been found guilty. And, upon rejecting the government's argument, this Court found it unnecessary, for double jeopardy purposes, to resolve whether Jenkins had been acquitted on the merits. 420 U.S. at 367-68, 370.

Finally, petitioner thinks it important that the Serfass Court refused to decide whether the dismissal of the indictment would have been appealable had jeopardy attached (Pet. at 21). Whatever the Court's reasons prompting this language, it was not tantamount to an overruling of Jenkins, decided only six days previously.

B.

Petitioner also argues that the decision below may have been wrong because respondent deliberately withheld his motion to dismiss for insufficient evidence until jeopardy had attached (Pet. at 12, 17, 21, 28). This accusation, which seeks to bring respondent within the ambit of the dictum in Serfass concerning the "knowing" deferral of motions to dismiss (420 U.S. at 394), was made by the state for the first time in the New York Court of Appeals. Contrary to petitioner's conclusion that the instant case presents this Serfass issue "as clearly as any case is likely to do" (Pet. at 12, 28), the court below had good reason for ignoring the state's accusation.

The record is barren of any evidence that counsel wilfully delayed seeking the dismissal of the indictment until jeopardy had attached. Rather, it affirmatively demonstrates that the defense, well before jeopardy had attached, actively sought dismissal. Specifically, on both February 21, 1973 and April 1, 1974 motions to dismiss the charge were made on a number of grounds. That the precise argument of insufficiency of evidence as to the "agreement or understanding" element of bribery was not made until trial, without more, cannot be deemed purposeful, given the total effort made by the defense to gain a pretrial dismissal of the charge. That neither the prosecutor at trial nor on appeal to the Appellate Division made such a charge against counsel renders its baselessness apparent. If anything, the record supports the favorable inference that counsel thought he lacked grounds for the insufficiency of evidence motion--for Stewart's preliminary hearing testimony, "That is up to you," not repeated at trial, easily could be construed as having established his agreement to act on respondent's behalf. Indeed, it appears from counsel's prefatory statement to his motion for the trial order of dismissal that he developed the "agreement or understanding" argument, possibly with guidance from Mr. Justice Birns, only after the People presented its case.

Counsel's conduct in this case thus bore no resemblance to that of counsel in United States v. Kehoe, 516 F. 2d 78 (5th Cir. 1975), cert. denied, 96 S. Ct. 1103 (1976), reh. denied, 96 S. Ct. 1687 (1976), the decision on which petitioner relies (Pet. at 28). In Kehoe, the defendant's attorney explicitly admitted that he withheld his motion to dismiss the indictment for facial defects--a motion which certainly could have been made prior to trial--until mid-trial so that he could view the government's case. 516 F. 2d at 80, 86. Here, counsel evinced no such intent to manipulate the judicial system--the motivation to which the Serfass dictum was obviously addressed.

C.

Petitioner further asserts that regardless of the timing of the motion to dismiss, the decision below may have been incorrect simply because respondent made the motion and thus "caused the case to be taken from the first jury" (Pet. at 14-5, 17). For this proposition, petitioner posits an analogy to United States v. Dinitz, 96 S. Ct. 1075 (1976), in which this Court upheld the constitutionality of the retrial of a defendant who aborted his first trial by requesting and securing a mistrial. Petitioner's contention--a thinly disguised waiver argument--is without merit.

First, there is no language in Wilson, Jenkins, or Serfass indicating it of any moment whether the defendants in those cases moved to dismiss the indictments.

Second, the mistrial analogy is inapt. As the Dinitz Court noted, the reason for permitting reprosecution of a defendant who affirmatively secures a mistrial is that he is deemed to have "retain[ed] primary control" over the decision not to continue with the first trial and to have another. 96 S. Ct. at 1081. Here, respondent requested that the trial be terminated in his favor. Had the trial court not dismissed the indictment he would have been required to proceed with the trial. Thus, respondent did not even express a desire to have a second trial, much less "control" whether another would be ordered.

Third, under New York law at the time of trial, had respondent not moved for the trial order of dismissal and been convicted, he may well have been precluded from raising the sufficiency of evidence point on appeal in the Appellate Division [see C.P.L. §470.15(4)(b), (6)(a)] and definitely would have been precluded from raising it in the court of appeals. People v. Thomas, 36 N.Y. 2d 514, 516-17, 330 N.E. 2d 609, 610, 369 N.Y.S. 2d 645, 647-48 (1975). Nothing in the record remotely suggests that by properly preserving an issue for purposes of appeal in the event of his conviction respondent thereby effected a voluntary and intelligent waiver of his constitutional right not to be twice placed in jeopardy. See Green v. United States, 355 U.S. 184, 191-92 (1957).

II. There is no conflict of decisional law requiring resolution by this Court.

Petitioner claims that there is "confusion" and "dispute" among lower courts concerning the interpretation of Wilson, Jenkins, and Serfass, and that the problem is exacerbated by Illinois v. Somerville, 410 U.S. 458 (1973), in which this Court permitted the retrial of a defendant whose first trial ended in a mistrial due to a defective indictment (Pet. at 20-4, 27). However much "confusion" petitioner imagines may exist and despite the many jurisdictions with statutes purporting to allow appeals by the prosecution (Pet. at 25-7), he has not cited, and we cannot find, even one lower court decision which conflicts with the decision below.

In fact, United States v. Robbins, 510 F. 2d 301 (6th Cir. 1975), cert. denied, 44 U.S.L.W. 3397 (Jan. 12, 1976), a citation notably absent from the petition, involved the identical double jeopardy issue as this case and reached the same result as the New York Court of Appeals. There, the court held that the double jeopardy clause barred the government's appeal from the district court's order granting Robbins's motion to dismiss the indictment for insufficient evidence at the close of the government's case. And, the government's double jeopardy analysis in its petition for a writ of certiorari was no different from that in the petition here. See Government's Petition for a Writ of Certiorari, No. 75-67, pp. 6-19.

Petitioner cites five cases which he claims disallowed government appeals only upon findings that the defendants may have been acquitted (Pet. at 22). These decisions, however, are actually in harmony with the decision below. State v. Lewis, 96 Idaho 743, 536 P. 2d 738 (1975), is essentially the same as the case at bar. The judge at Lewis's jury trial dismissed the indictment for insufficient evidence on the defendant's motion at the close of the prosecution's case. 96 Idaho at 745, 747; 536 P. 2d at 740, 742. As in New York, Idaho law gave only the jury power to determine the credibility of the proof. 96 Idaho at 748; 536 P. 2d at 743. In short, Lewis was no more acquitted on the merits than was respondent. The Idaho Supreme Court merely stated that "for double jeopardy purposes" Lewis was deemed acquitted. 96 Idaho at 750-51; 536 P. 2d at 745-46.

In the four federal cases cited, the characterizations of the respective dismissals of the indictments as acquittals were also purely formalistic. The appeals were barred solely because of the Jenkins criterion of "further proceedings" [United States v. Martin Linen Supply Co., 534 F. 2d 585, 586, 588-89 (5th Cir. 1976), petition for cert. filed July 27, 1976 (No. 76-120); United States v. Patrick, 532 F. 2d 142, 143, 147 (9th Cir. 1976); United States v. Fayer, 523 F. 2d 661, 663-64 (2nd Cir. 1975); United States v. Lucido, 517 F. 2d 1, 3 (6th Cir. 1975)].

Several of the other cases cited do not even present the same issue as here. Specifically, four cases, relying on Illinois v. Somerville, supra, permitted government appeals or retrials following mid-trial dismissals of facially defective indictments [United States v. Lee, ___F. 2d___ (7th Cir. 1976); United States v. DiSilvio, 520 F. 2d 247 (3rd Cir. 1975), cert. denied, 96 S. Ct. 447 (1975); United States v. Kehoe, supra; State v. Russo, 70 Wisc. 2d 169, 233 N.W. 2d 485 (1975)](Pet. at 20-2).

And, in United States v. Sedgwick, 345 A. 2d 465 (D.C. Ct. App. 1975), the mistrial issue clouded the question of whether the subsequent dismissal of the indictment barred the appeal. Indeed, the opinion focused exclusively on the propriety of the trial judge's granting of the mistrial rather than on his dismissal of the indictment.* 345 A. 2d at 468-73. Thus, the Sedgwick opinion belies petitioner's assertion that an appeal and retrial would have been allowed absent the declaration of the mistrial (Pet. at 22 n. 10).

Finally, whatever significance petitioner may attribute to United States v. Sanford, 503 F. 2d 291 (9th Cir. 1974), vacated and remanded, 421 U.S. 996 (1975), on remand, ___F. 2d ___ (May 27, 1976), and the three Tenth Circuit Court of Appeals' cases [United States v. Morrison, United States v. Rose, United States v. Kopp (1975), petitions for cert. filed April 23, 1976, Nos. 75-1534, 1535, 1536](Pet. at 23-4), these decisions raised issues which simply are

*It is perhaps not insignificant that the appeal in Sedgwick was argued a few weeks prior to this Court's decisions in Wilson, Jenkins, and Serfass (see 345 A. 2d at 465), and that defense counsel on appeal apparently argued only that the mistrial was not manifestly necessary (345 A. 2d at 468).

not in dispute in the case at bar. As the facts of Sanford make plain, the pivotal issue there was whether jeopardy had attached at the time the indictment was dismissed. And in the three other decisions, the obvious question was whether they were directly controlled by Wilson.

In sum, there is no conflict among the lower courts as to the issue presented in this case. Absent a conflict, petitioner's lengthy discussion of numerous statutes in various jurisdictions allowing government appeals is irrelevant.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

SUSAN E. HOFKIN
Of Counsel
September, 1976

APPENDIX A

MINUTES OF PRELIMINARY HEARING, PAGES 10-13

PRELIMINARY HEARING

THE COURT: Sustained.

Q Was Patrolman O'Connor the only other officer present, at the second conversation?

A Yes sir, he was.

Q Who was wired at that conversation?

A I --

MR. ORTIZ: Objection.

THE COURT: Sustained.

Q What was said at that conversation?

A The defendant stated to me, that he was willing to pay 75 or 100 Dollars, to have all the charges dropped against the defendant Rodriguez.

Q When you went in the room for the second conversation, who was the first one to speak?

MR. ORTIZ: Objection.

THE COURT: Overruled.

A The defendant was.

Q What was your response to his statement?

A What was my response to his statement?

Q That is right.

PRELIMINARY HEARING

A The defendant asked me something. I said, I would be with you in a minute.

THE COURT: What did the defendant ask you?

THE WITNESS: He asked me, if he could leave.

THE COURT: Which defendant are you referring to?

THE WITNESS: Referring to Mr. Brown. Mr. Brown asked me, if he could leave.

THE COURT: Were those his first words to you?

THE WITNESS: Yes.

Q What did you say?

A I said, just a minute.

THE COURT: Was that what he said to you before he asked what he told you, he would like to have his friend, Mr. Rodriguez freed?

PRELIMINARY HEARING

THE WITNESS: No, this is regarding the second conversation. This is after he had already stated to me, that he wished to have his friend freed, and offered me the sum of 75 to 100 Dollars.

Q And then you told Mr. Brown that he could not leave, is that correct?

A I never told Mr. Brown he could not leave at all.

Q When he said, could he leave?

A I said, just a minute. I will be with you in a minute.

Q What happened after a minute was over?

A Patrolman O'Connor then walked into the room, and Mr. Brown said, what are we going to do?

Q What was your response?

A I said, that is up to you.

Q What did Patrolman O'Connor say, during this time?

MR. ORTIZ: Objection.

PRELIMINARY HEARING

THE COURT: Sustained.

Q You said, that is up to you, and what was said next?

A I don't remember verbatim, what the actual exchange of words were.

Q What do you remember?

A I remember the defendant again stating, that he wished to have his friend freed of all charges, and he is willing to pay 75 to 100 Dollars.

Q Did he state, who this payment was to be made to?

A I don't remember.

Q Do you remember if he ever stated, that he would be willing to pay the auto company, for any amount for which the car was overdue, and which was owed to the auto company, which was involved in Mr. Rodriguez's case?

A No sir, the initial conversation the defendant said, he wished to give me 75 to 100 Dollars.

Q Did there come a time, at which you searched my client?

APPENDIX B

MINUTES OF TRIAL, PAGES 115-19, 121

to me I heard.

THE COURT: There were sounds and words that you were unable to put down on the transcript?

THE WITNESS: Yes, sir.

BY MR. LEVINE:

Q When you made the transcript from the duplicate copy did you hear on that copy of the tape the words, "keep it from getting before the Judge?"

A No, sir, I did not.

Q Do you remember these words being said in the actual conversation?

A Yes, sir, I do.

Q And, what did you hear when you made the duplicate copy and made the transcript that did you hear?

THE COURT: Objection sustained.

Q What did you transcribe?

THE COURT: You have the transcript before you but the transcript is not in evidence.

Q I'll withdraw that question.

THE COURT: It is for the jury to determine from this tape what was said and that's really the best evidence in the case as compared to the transcript and that's what I pointed out to the jury. If at any time the jury wants it replayed, I will

be glad to replay it.

BY MR. LEVINE:

Q Detective Stewart, have you prior to today in Court heard the original tape, People's 4 hear it other than here in Court?

A Yes, sir, in the sound room of the district attorney office.

Q Is that a specially designed or accoustics sound room?

MR. ROSENBLOOM: objection, your Honor.

THE COURT: Sustained.

Q When you heard it made in the sound room of the district attorney's office on the original tape, did you then hear the words, "keep it from getting in front of the Judge?"

MR. ROSENBLOOM: Objection.

THE COURT: Sustained.

Q When you heard the original tape--

THE COURT: What is heard on any other occasion is really irrelevant. It is for this jury to use from the evidence of what is heard in this courtroom that the conversation was and what was heard by any of the parties--any of the participating parties.

Q When you heard the original tape in the distric

attorney's office sound room had you already heard the tape, People's 2 for identification, at that time?

A Yes, sir, I have.

THE COURT: You have cross examination in front of you, is that correct?

THE WITNESS: Yes.

THE COURT: I have some other matters which is going to require most of the afternoon before me and I think under these circumstances it wouldn't be fair to have you sit around for two and half hours, so under these circumstances I will excuse you until tomorrow morning at 10 o'clock.

Bear in mind my admonitions, do not discuss the case, permit no one to discuss the matter with you. Form no opinion about the case until submitted to you.

Tomorrow morning at 10 o'clock, please.

(Thereupon the jury is excused for the day.)

MR. LEVINE: I would like to turn over the rosario material.

THE COURT: There is an endorsement on the papers that you are to go right back to the Tombs, Mr. Brown.

THE DEFENDANT: Thank you.

MR. LEVINE: I wish the record to reflect I am giving Mr. Rosenbloom the two applicable pages of Detective Stewart's memorandum book, photo copies a copy of the arrest report of Angel Rodriguez, a copy of the arrest report of the defendant, a copy of the UF 61 with respect to the defendant, four papers that have been previously marked for identification respecting Officer Sevalli and the grand jury minutes of Detective Stewart. I believe Mr. Rosenbloom has a copy of the Criminal Court minutes.

THE COURT: You will have to hand these papers on at a time to Miss Benjamin for proper endorsement. What is the first paper

People's 6, grand jury minutes, for identification.

People's 7, UF 61, arrest of King Brown, for identification.

People's 8, P.D. 244 arrest report, for identification.

People's 9, photo copy arrest report of Angel Rodriguez.

People's 10 pages 22, 23 photostat copies of pages of memo book.

(Thereupon the above mentioned documents were marked accordingly for identification.

MR. ROSENBLOOM: Do you have any notes or memorandum made by yourself in conversation of any of the witnesses?

MR. LEVINE: I have turned over all rosario material in possession of the People, your Honor.

- - - -

we do the best we can under the circumstances. We are ready to proceed, now.

MR. LEVINE: Yes, your Honor.

MR. ROSENBLOOM: Yes, sir.

THE COURT: I am sorry for this equipment that is blocking out Juror No. 6 or the first alternate but I will move around so you can see I'm here.

Would you come up Mr. Stewart, please.

THE CLERK: Detective Timothy Stewart resumes now under cross examination.

THE COURT: All right, Mr. Rosenbloom, lets go.

CROSS EXAMINATION

BY MR. ROSENBLOOM:

Q Detective Stewart how long have you been a detective?

A Since December of 1973.

Q That's approximately ten months after this arrest, correct?

A That's correct.

Q And, did you have an opportunity to testify in Criminal Court, Part A P 6?

THE COURT: You mean did he testify?

MR. ROSENBLOOM: Yes,

Q Did you testify in Part A P 6?

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

KING BROWN,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITIONER'S REPLY

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PETITIONER'S REPLY

Respondent's brief in opposition demonstrates convincingly that there exists between the parties a substantial disagreement about the principles and policies of the Double Jeopardy Clause, about the meaning of many of the cases cited in the petition, and especially a disagreement about the meaning of this Court's decisions in *United States* v. *Wilson,* 420 U.S. 332 (1975), *United States* v. *Jenkins,* 420 U.S. 358 (1975), and *Serfass* v. *United States,*

420 U.S. 377 (1975). These disagreements accurately reflect a similar dispute among the judges who have had to interpret *Wilson, Jenkins* and *Serfass.* Thus, there have been conflicts, not only in the results reached by many lower federal and state courts, but, as important, great differences in their analysis of this Court's decisions. *See* Petn., pp. 17-24. For the purposes of this petition, the existence of such serious dispute is more important than the merits of the dispute itself, and so we will not repeat or expand upon those arguments, outlined in our petition, that we think support our interpretation of these cases.

The brief in opposition does, however, raise several points that require response.

1. Although respondent does not "feel equipped" to argue the point or urge it upon this Court, he nevertheless raises the specter of an "independent and adequate state ground" upon which the decision below might have been based. (Brief in opposition, p. 1, n.1; *see also* pp. 2, 4.) The Court of Appeals, however, based its decision entirely on the Federal Constitution. In 1974, the Court of Appeals upheld N.Y. CPL section 450.20(2), the statute that grants the state a right to appeal in a case such as this one. *People* v. *Fellman,* 35 N.Y.2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100 (1974), *remit. amended,* 35 N.Y.2d 853, 321 N.E.2d 880, 363 N.Y.S.2d 89 (1974). In the instant case, the same Court of Appeals reversed itself. The only relevant intervening circumstance was this Court's decisions in *Jenkins, Wilson* and *Serfass.* In these three cases this Court interpreted the Double Jeopardy Clause of the United States Constitution. Several times in the opinion below the Court of Appeals said explicitly that it was reversing itself and declaring N.Y. CPL section 450.20(2) unconstitutional only because it was constrained to do so by this Court's interpretation of the Federal Constitution. We quote just two examples:

> We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman,* 35 NY2d 158, mot to amd rem granted 35 NY2d 853). Subsequent to our decision in *Fellman,* however, the United States Supreme Court decided three cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson,* 420 U.S. 332, and *United States* v. *Jenkins,* 420 U.S. 358, decided February 25, 1975, and *Serfass* v. *United States,* 420 U.S. 377, decided less than a week later on March 3, 1975). We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary, in *People* v. *Fellman,* 35 NY2d 158, *supra.* (Petn., App. E, pp. 14a-15a).
>
> • • •
>
> While there is much in logic to support [the state's analysis of the Double Jeopardy Clause], we conclude that the Supreme Court by its recent trilogy of double jeopardy cases has expressly rejected any such analysis and has interpreted the federal double jeopardy clause exactly as did the court below. As that clause, found in the federal constitution, is binding on the states (*Benton* v. *Maryland,* 395 US 784), we accordingly are constrained to conclude that the order at the Appellate Division dismissing the appeal to that Court must now be affirmed. (Petn., App. E, p. 18a).

2. In our petition we suggest that the Court of Appeals was wrong for two separate reasons. First, the state's appeal should have been allowed because reprosecution

would not violate any of the policies or principles of the Double Jeopardy Clause. The prosecutor was not harassing the defendant or seeking a trial before a more favorable tribunal. Most importantly, the defendant was not "acquitted" at the first trial. Second, the state should have been allowed to appeal because the defendant had an opportunity before trial to seek the legal ruling on which he later prevailed but did not do so until after jeopardy attached. Each of these reasons, we suggest, raises a significant question which warrants review by this Court. (Petn., p. 28.)

Respondent appears to concede what most of his argument amply illustrates—that the first, and more important, of these two questions is raised clearly in this case. According to respondent, however, the second question is not so clearly involved here because defense counsel had a good excuse for not making the motion before trial. (Brief in opposition, p. 6.) Regardless of whether defense counsel's excuse is good or not (which we will discuss below), the undisputed facts remain: that New York provided a way for defense counsel to raise his legal point by moving before trial to dismiss the indictment under N.Y. CPL section 210.20 (1) (b) (*see* Petn., pp. 4-5); that he did not do so, although he moved to dismiss the indictment on unrelated grounds under other sections of the Criminal Procedure Law;* and that he waited to make his motion until

* Respondent says that he moved to dismiss the charge "on a number of grounds" on February 21, 1973, and on April 1, 1974. (Brief in opposition, p. 6.) On April 1, 1974, respondent moved to dismiss the indictment under N.Y. CPL section 200.50(7), on the grounds that its allegations were too conclusory. He also moved, under an unspecified section of the Criminal Procedure Law, to dis-

(footnote continued on next page)

after the state had put on its case, that is, until after jeopardy attached. We urge here, as we did in the Court of Appeals below, that these circumstances ought to be relevant in deciding whether the state's appeal is constitutionally permissible. *See Serfass* v. *United States,* 420 U.S. at 394. The Court of Appeals, because it felt constrained to apply a mechanical rule, ignored these circumstances entirely. It is difficult to imagine a case that raises this issue more clearly.

Moreover, the reason advanced by respondent for his failure to make the appropriate motion before trial is no reason at all. What respondent suggests is this: one phrase in the arresting officer's testimony at the preliminary hearing ("that is up to you") established, or could have been construed to establish, that the officer in fact agreed to act corruptly on Brown's behalf. Therefore, because of this phrase, defense counsel did not move to dismiss the subsequent indictment and raise the question whether the officer agreed to act corruptly. At the trial, however (according to respondent), this one phrase was not repeated; so then, for the first time, defense counsel had grounds to make the motion upon which he prevailed. (Brief in opposition, p. 6.)

First, there is nothing about the preliminary hearing testimony, including the quoted phrase, that suggests, even

miss the case because he claimed he had been prejudiced by a delay in prosecution. February 21, 1973, the other date mentioned in respondent's brief in opposition, was two days after respondent's arrest. He had not yet been indicted. On that day there was a preliminary hearing held to determine whether respondent's case should be referred to the grand jury. At the end of the hearing, respondent moved to dismiss the case because, he argued, the evidence showed he had been entrapped.

remotely, that the officer agreed to act corruptly on Brown's behalf. The officer's testimony was clear. Brown came into the stationhouse and made a corrupt offer. The officer put Brown off, informed his superiors, and then had further conversations with Brown. In these conversations, the officer played along with Brown ("that is up to you") until Brown repeated his offer—this time for the benefit of a tape recorder. When the offer was repeated, Brown was arrested.*

Second, the testimony at trial was to precisely the same effect. The officer played along with Brown until the offer was repeated. Then Brown was arrested. The conversation leading to the second offer and the arrest was tape-recorded and played to the jury. The tape shows that, contrary to respondent's assertion, the arresting officer used almost exactly the same phrase he had previously described at the preliminary hearing. "You know, it's up to you what you want to do." (People's Exhibit 1, People's Exhibit 2 for identification, p. 4).** In fact, he repeated in essence the same phrase five more times—four times while talking to Brown,† and once while talking to Angel Rod-

* The full transcript of the preliminary hearing, including the four pages appended to the respondent's brief in opposition, is attached to this Reply as Appendix H.

** People's Exhibit (Peo's Exh.) 1 is the tape played to the jury. Peo's Exh. 2 for identification (Peo's Exh. 2-ID) is a transcript of the tape which was given as an aid to the jury while the tape was being played. (Minutes of trial, April 4, 1974, pp. 19, 25, 32; Minutes of trial, April 10, 1974, pp. 47-51).

† "Whatever you want to do, you let us know." (Peo's Exh. 2-ID, p. 2); "I mean whatever you want to do, do it now" (Peo's Exh. 2-ID, p. 4); "Well, what do you want to do?" (Peo's Exh. 2-ID, p. 5); "What do you want to do?" (Peo's Exh. 2-ID, p. 11).

riguez, the man Brown wanted to free.* After hearing this testimony at trial, defense counsel successfully moved to have the indictment dismissed. Based on what he knew before trial, he could have moved, before trial, for the same relief under C.P.L. section 210.20(1)(b). Instead, he waited until jeopardy attached.

Finally, respondent tries to minimize our second argument by pointing to our alleged failure to make it in the Appellate Division (Brief in opposition, pp. 5, 6). However, at the time we filed our briefs in the Appellate Division, the state's right to appeal in this case was clearly established by *People* v. *Fellman, supra. Jenkins, Wilson* and *Serfass* had not yet been decided.** Thus, it was not until we filed our brief in the Court of Appeals that we had an opportunity to assess the effects of *Jenkins, Wilson* and *Serfass* and to make arguments based on these cases.

* "It's up to you. You want him to get you out or don't you?" (Peo's Exh. 2-ID, p. 8).

** The state's (appellant's) brief in the Appellate Division was filed on December 11, 1974. The respondent's brief was submitted on February 11, 1975. The state's reply brief was submitted on February 19, 1975. *Wilson* and *Jenkins* were decided on February 25, 1975, and *Serfass* was decided on March 3, 1975. The oral argument was on March 5, 1975, just two days after *Serfass* was decided. On that day the respondent filed a supplemental memorandum in which he discussed *Wilson* and *Jenkins,* but not *Serfass.*

Conclusion

Respondent has attempted to create doubts about whether this case raises the important constitutional issue outlined in our petition. These attempts are not supported by the record. The case does in fact raise, as clearly as any case is likely to raise, the two issues left open in *Serfass*. 420 U.S. at 394, *supra*. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX H

Minutes of Preliminary Hearing

CRIMINAL COURT OF THE CITY OF NEW YORK

PART AP-6 COUNTY OF NEW YORK

Docket: N309923

CHARGE: 200.00

THE PEOPLE OF THE STATE OF NEW YORK

against

KING BROWN

February 21, 1973

Before:

Hon. MILTON SAMORODIN, Presiding Judge

Appearances:

JUAN ORTIZ, Esq.
Assistant District Attorney
Attorney for the People

LEGAL AID SOCIETY
100 Centre Street
New York, New York

By: JAMES GOLDFARB, Esq.
Attorney for the Defendant

ROBERT ELMAN
Court Reporter

PHILIP MURPHY
Bridgeman

Minutes of Preliminary Hearing

Preliminary Hearing

Bridgeman: Docket Number N309923, King Brown, charged with 200.00 of the Penal Law. This matter is marked ready for a hearing.

Mr. Ortiz: The People call Officer Stewart.

PATROLMAN TIMOTHY STEWART, having been called as a witness, testified as follows:

The Court: Raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Court: State your name, your shield number, and your assignment.

The Witness: Patrolman Timothy Stewart, Shield Number 24793, 26 Precinct Anti-Crime Unit, Police Department, City of New York.

Direct examination by Mr. Ortiz:

Q. Patrolman Stewart, I would like to bring your attention to February of this year, and ask you if you were on duty at 1:30 in the morning? A. Yes, I was.

Q. Were you at the 26th. Precinct? A. Yes sir, I was.

Q. Where is that located? A. At 520 West 126th. Street, in Manhattan.

Q. Will you tell us what happened, if anything, at that time? A. I was approached by the defendant.

Q. Who is that? A. Mr. Brown.

Minutes of Preliminary Hearing

Q. Sitting here? A. Sitting right here.

The Court: What is your name, sir?

The Defendant: Cleveland Brown.

The Court: Let the record indicate, the officer identified the defendant.

A. Cont'd. I was asked by the defendant, if he could talk to me in regards to a friend of his, who had been arrested by myself.

Q. Did he mention any names? A. Yes, the defendant's friend was Angel Rodriguez, who I had arrested earlier that evening. I said, what do you wish to speak to me about? The defendant said, I would like to see what I could do for him. I said, what exactly do you mean? He said, I am willing to give you 75 or 100 Dollars, if my friend can be dropped of all the charges against him. I then informed the defendant, I was placing him under arrest for bribery, and informed him of his rights.

Q. Did you place him under arrest at that point, when he first came into the station house and spoke to you? A. The first time he came into the station house, was approximately 12:15. At that time, I had a conversation with the defendant. I then notified my Superior Officers the conversation I had transacted, who notified Internal Affairs Department of the Police Department.

Q. Then did you have a subsequent conversation after that? A. Yes sir, I did.

Q. What was the substance of that conversation? Was it the same as you stated? A. Yes sir, it was.

Q. Where did that second conversation take place? A. In the sitting room of the 26th. Precinct.

Q. Was anybody with you at the time? A. Yes, Patrolman James O'Connor, of the 26th. Anti-Crime Unit.

Mr. Ortiz: No further questions.

Cross-examination by Mr. Goldfarb:

Q. Patrolman Stewart, did you make any written notation concerning this incident? A. Yes sir.

Q. Do you have any of those written notations with you in Court today? A. No sir, I don't.

The Court: Patrolman, in the event you are required to testify in any future proceeding in this matter, be sure to bring your memo book and any other documents in which you have notations.

The Witness: Yes sir.

Q. What written notations did you make? A. I made a notation of the arrest.

Q. What forms did you fill out specifically?

Mr. Ortiz: Objection, Your Honor.
The Court: Sustained.

Q. What time did you make the arrest of Mr. Rodriguez? That is the man referred to by my client? A. Yes sir, I did.

Q. When and where, was that arrest?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. At what time was that arrest?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. How long had Mr. Rodriguez been in the precinct, when my client first appeared?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. What time did my client first appear in the precinct, and speak with you? A. 12:15.

The Court: A.M., or P.M.?
The Witness: A.M., the 20th.

Q. Where did you first see him? A. In front of the desk, the front desk.

Q. Were there any other officers present at that time? A. Several.

Q. Can you name them and their shield numbers? A. Patrolman James O'Connor of the 26th. Anti-Crime Unit, is the only officer I would know offhand.

Q. How many officers would you say were there approximately? A. Four or five.

Q. What was said by my client at that time? A. Just that he wanted to speak with me.

Q. What was your reply? A. I said, I will be right with you.

Q. What was the next thing said? A. We walked into the sitting room, and the conversation I just testified to, was exactly what happened.

Q. Who was in the sitting room? A. At that time?

Q. That is right. A. Myself.

Q. Was Patrolman O'Connor there at that time? A. Not on the first conversation.

The Court: Were you alone in the sitting room?

The Witness: On the first, the original conversation.

The Court: All by yourself?

The Witness: Yes, Your Honor.

The Court: No one else was there with you?

The Witness: Not on the original, the first conversation.

The Court: With whom did you have the conversation?

The Witness: The defendant was with me.

Q. What was said, exactly? A. I already testified, that the defendant stated, that he wished to see what he could do for his friend.

Q. Were those his exact words? A. I don't recall his exact words at this time.

Q. Then what did you say? A. I said, what do you mean? The defendant stated, he wanted to get his friend free, and he would be willing to pay 75 or 100 Dollars.

Q. What did you say immediately, when he said that? A. I said, I would have to speak with my partner.

Q. Did my client at any time, take out any money whatsoever? A. No sir, he did not.

Q. What happened after you left the room? Who did you speak with? A. As I previously testified, I notified my superior.

Q. Who is that? A. Sergeant Martin Veilson, of the 26th. Anti-Crime Unit, and the Internal Affairs Division.

Q. What happened next? A. Approximately an hour and ten minutes, or an hour and fifteen minutes later, I had another conversation with the defendant, and this time Patrolman O'Connor was present.

Q. Was that second conversation taped? A. Yes sir.

Mr. Ortiz: Objection.

The Court: I will let the answer stand.

Q. Do you have the tape with you in Court today?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. Was Patrolman O'Connor the only other officer present, at the second conversation? A. Yes sir, he was.

Q. Who was wired at that conversation? A. I—

Mr. Ortiz: Objection.

The Court: Sustained.

Q. What was said at that conversation? A. The defendant stated to me, that he was willing to pay 75 or 100 Dollars, to have all the charges dropped against the defendant Rodriguez.

Q. When you went in the room for the second conversation, who was the first one to speak?

Mr. Ortiz: Objection.

The Court: Overruled.

A. The defendant was.

Q. What was your response to his statement? A. What was my response to his statement?

Q. That is right. A. The defendant asked me something. I said, I would be with you in a minute.

The Court: What did the defendant ask you?

The Witness: He asked me, if he could leave.

The Court: Which defendant are you referring to?

The Witness: Referring to Mr. Brown. Mr. Brown asked me, if he could leave.

The Court: Were those his first words to you?

The Witness: Yes.

Q. What did you say? A. I said, just a minute.

The Court: Was that what he said to you before he asked what he told you, he would like to have his friend, Mr. Rodriguez freed?

The Court: Sustained.

Q. You said, that is up to you, and what was said next? A. I don't remember verbatim, what the actual exchange of words were.

Q. What do you remember? A. I remember the defendant again stating, that he wished to have his friend freed of all charges, and he is willing to pay 75 to 100 Dollars.

Q. Did he state, who this payment was to be made to? A. I don't remember.

Q. Do you remember if he ever stated, that he would be willing to pay the auto company, for any amount for

which the car was overdue, and which was owed to the auto company, which was involved in Mr. Rodriguez's case? A. No sir, the initial conversation the defendant said, he wished to give me 75 to 100 Dollars.

Q. Did there come a time, at which you searched my client?

The Witness: No, this is regarding the second conversation. This is after he had already stated to me, that he wished to have his friend freed, and offered me the sum of 75 to 100 Dollars.

Q. And then you told Mr. Brown that he could not leave, is that correct? A. I never told Mr. Brown he could not leave at all.

Q. When he said, could he leave? A. I said, just a minute. I will be with you in a minute.

Q. What happened after a minute was over? A. Patrolman O'Connor then walked into the room, and Mr. Brown said, what are we going to do?

Q. What was your response? A. I said, that is up to you.

Q. What did Patrolman O'Connor say, during this time?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. Did you ever find any money whatsoever on my client?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. The tape that was made, was that the second conversation?

Mr. Ortiz: Objection, I—

Mr. Goldfarb: I would ask the District Attorney, to allow me to ask the question, before he objects.

The Court: Let Mr. Goldfarb finish his question.

Q. Was the total of the second conversation taped?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. How long did the first conversation take?

The Court: By the first conversation you mean, the one shortly after midnight, is that right?

Mr. Goldfarb: Yes.

A. Approximately 10 minutes.

Q. And that duration of time between the first and second you said, was a little over an hour, is that correct? A. That is correct.

Q. How long did the second conversation take, from the time you walked into the room, until the conversation ended? A. Approximately 20 minutes.

Q. Is Patrolman O'Connor in Court today? A. No sir.

Mr. Ortiz: Objection.

The Court: Overruled, let the answer stand.

Q. Did my client say, he would pay you right then and there?

Mr. Ortiz: Objection.

The Court: Sustained.

Mr. Goldfarb: No further questions.

Mr. Ortiz: That is the People's case on the hearing.

Mr. Goldfarb: Your Honor, at this time, I move to dismiss the charges against my client, on the grounds that the People have failed to show reasonable cause to believe he committed the crime with which he is charged. Specifically, Your Honor, I believe that there is a serious issue of entrapment in this case. I believe it was the officer's own testimony, that my client at a certain point, wanted to leave, and was told, he should not leave. I would ask, that The Court dismiss the charges against my client on those grounds.

The Court: On the basis of the officer's testimony, I find there is reasonable cause to believe that a crime has been committed by the defendant, and accordingly, the motion to dismiss is denied. The defendant is held for the Grand Jury. Is your client still remanded? Do I hear anything with respect to bail?

Mr. Goldfarb: Yes, Your Honor, my client informs me, that he has lived at his current address for three months, and he has lived in New York City for 20 years.

The Court: I don't see how your client has lived in New York City for the last 20 years, when he has been in jail so many times. There are seven pages of yellow sheets.

Mr. Goldfarb: I don't believe, that my client looks upon jail as a permanent residence.

Minutes of Preliminary Hearing

Mr. Ortiz: The People would ask for 5000 Dollars bail.

The Court: On the basis of the defendant's prior record, I am fixing Insurance Company Bond of 10,000 Dollars, or 6000 Dollars cash bail.

Bridgeman: You may communicate free of charge by letter or telephone, from the office of the Warden.

Certified to be a true and accurate transcript.

Robert Elman
Court Reporter

No. 76-358

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

KING BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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QUESTION PRESENTED

Whether the Double Jeopardy Clause forbids a second trial, and consequently an appeal by the prosecution, when an indictment is dismissed by the court in mid-trial at the request of the accused.

INTEREST OF THE UNITED STATES

The Criminal Appeals Act, 18 U.S.C. 3731, allows the United States to appeal in any criminal case from an order dismissing an indictment. This Court has concluded that the effect of the Criminal Appeals Act is to allow the United States to appeal from any order terminating a prosecution in favor of the accused, unless the Double Jeopardy Clause would prohibit further proceedings if the prosecution were to prevail on appeal. *United States*

v. *Wilson*, 420 U.S. 332, 336-339. Resolution of the question presented in this case—whether the Double Jeopardy Clause forbids further proceedings after an indictment has been dismissed in the middle of a jury trial at the behest of the accused—therefore would control the right of the United States to appeal under the Criminal Appeals Act no less than the right of a State to appeal under a statute, such as that of New York (N.Y. Crim. P. Law §§ 450.20 and 290.10 (McKinney 1971)), that explicitly provides for such appeals.

The United States believes that the issue presented in this case is currently the most important unresolved problem in the interpretation of the Double Jeopardy Clause. If judgments entered in mid-trial at the request of the accused—before submission of the case to the jury, with the attendant exposure of the defendant to risk of conviction—are insulated from review, defendants in substantial numbers of cases will receive what we believe to be unjustifiable windfall benefits. Because of the volume of federal criminal litigation, the United States has a pressing interest in the resolution of the question presented here.

DISCUSSION

The New York State Court of Appeals, perceiving itself to be "constrain[ed]" (Pet. App. 15a) by the decisions of this Court in *United States* v. *Wilson*, *supra*; *United States* v. *Jenkins*, 420 U.S. 358; and *Serfass* v. *United States*, 420 U.S. 377, has overruled one of its recent cases and held that the Double Jeopardy Clause forbids the State to appeal from an order dismissing an indictment entered in mid-trial at the request of the accused. It did so because it read *Wilson*, *Jenkins* and *Serfass* as creating an inflexible rule that, once jeopardy has attached in

a criminal prosecution and proceedings have terminated in favor of the accused, any further proceedings are forbidden by the Double Jeopardy Clause.[1]

1. An inflexible rule such as that adopted by the court in this case cannot properly be distilled from prior decisions of this Court. Not only does the recent trilogy of opinions two Terms ago abstain from such an approach, but the approach is inconsistent with *Illinois* v. *Somerville*, 410 U.S. 458, in which a trial was terminated in the defendant's favor, after jeopardy had attached, by the dismissal of a defective indictment. True, the termination in *Somerville* was labelled a mistrial, but this Court has unequivocally rejected the notion that the label attached to the trial court's action is dispositive of the double jeopardy question. See *United States* v. *Sisson*, 399 U.S. 267, 290; *United States* v. *Jorn*, 400 U.S. 470, 478 n. 7; *Serfass* v. *United States*, *supra*, 420 U.S. at 392.

The issue of the appealability of mid-jury-trial terminations in favor of the accused is one of far-reaching practical importance, yet one which has been clouded by this Court's divergent approaches to double jeopardy problems in various cases. There is considerable tension in the doctrines that have been developed to resolve claims arising out of mid-trial terminations. In one line of cases, exemplified by *Somerville* and *Gori* v. *United States*, 367 U.S. 364, the Court has emphasized flexibility and practical considerations; it has inquired whether the accused has been deprived of an interest the Double Jeopardy

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[1]The New York court's feeling of constraint appears unwarranted in view of this Court's express reservation of questions such as that presented here. *Serfass*, *supra*, 420 U.S. at 394.

Clause was designed to protect and, if he has been, whether that deprivation was supported by manifest necessity. It has allowed second trials even though the first trial ended with a judgment in favor of the accused and even though, as in *Somerville*, the first trial was ended over the objection of the accused. Yet in another line of cases, exemplified by *Fong Foo* v. *United States*, 369 U.S. 141, the Court seemingly has followed an absolutist rule, stating that if the first trial ends with a decision in favor of the accused, a second trial is impermissible even if the decision was erroneous, was rendered at the specific request of the accused, and effectively removed the case from the consideration of the jury.

Wilson, *Jenkins* and *Serfass* can be read as belonging to either of these lines of cases. In our view the Court used the practical approach, for it allowed the prosecution to appeal in *Wilson* and *Serfass* from "judgments" (as opposed to "verdicts") terminating the case in favor of the accused. It did so even though the judgment in *Wilson* was entered after jeopardy had attached, and even though the judgment in *Serfass* was based upon the district court's resolution of the general issue. The Court explained these decisions, however, by pointing out that a decision in favor of the prosecution would not lead to further proceedings or to a second jeopardy in the district court, and in so doing it may be thought to have implied (although it did not say) that the possibility of further proceedings would in every case violate the Double Jeopardy Clause.

This latter implication cannot be reconciled with *Gori*, *Somerville*, *United States* v. *Dinitz* (No. 74-928, decided March 8, 1976), and the many other cases in which the Court has upheld the propriety of additional proceedings after the trial judge has aborted a trial and called the termination a mistrial. It is also irreconcilable with the

Court's numerous holdings that if a case proceeds to a verdict of guilty, and the court of appeals or some other court later sets aside the verdict because of a defect in the indictment or trial, the Double Jeopardy Clause does not bar a second trial. See, *e.g.*, *United States* v. *Tateo*, 377 U.S. 463; *United States* v. *Ball*, 163 U.S. 662.

The tensions in the rationales advanced by the Court have produced several lines of cases in the lower courts reaching disparate results. Some of the cases consider the policies underlying the Double Jeopardy Clause and conclude that further trial proceedings would not be barred. See, *e.g.*, *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (allowing a second trial after an indictment was dismissed in mid-trial at the request of the accused). Others simply announce an inflexible rule that once a case has terminated in favor of the accused no further proceedings can be held. See, *e.g.*, *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048. These cases are catalogued at Pet. 21-24, and (although we do not agree with the State's characterization of all of them) we believe that the conflict among the circuits and the state courts is an aggravated one and that the confusion is growing daily. Prompt resolution of the problem presented here is essential.

2. If the trial court in this case had declared a mistrial over respondent's objection, based on a defect in the indictment, a new trial would have been permitted under *Somerville* so long as the trial court's decision were arguably correct. If the trial court had denied respondent's motion to dismiss, the case had proceeded to verdict under an indictment later determined to be invalid, and the conviction therefore had been set aside on respondent's appeal or on collateral attack, a new trial would have been permitted under *Tateo* and *Ball*. These

results would be consistent with the entirely practical way the Court usually has interpreted the protections of the Double Jeopardy Clause. That jeopardy may attach before proceedings conclude in favor of an accused begins rather than ends the analysis (*Serfass*, *supra*, 420 U.S. at 390), and the defendant's right to be free of multiple trials must be weighed against (and at times subordinated to) other considerations of policy. See *United States* v. *Jorn*, *supra*, 400 U.S. at 484.

In our view, the substantial protections of the Double Jeopardy Clause are not called into question when an accused voluntarily surrenders his right to have the jury pass upon his guilt or innocence and instead asks the trial judge, who cannot convict him, to terminate the proceedings. In such cases there is no risk of conviction, no risk that a second prosecution will re-examine facts found in the first prosecution, no risk that a "verdict" in favor of the accused will be set aside. The careful balancing of interests carried out in *Dinitz*, *Somerville*, and like cases is no less appropriate when a trial ends in an order dismissing an indictment than when it ends in a mistrial.

The instant case is in fact stronger for the prosecution than *Somerville* was in one important respect: in *Somerville* the accused objected to termination of the trial and asserted his "valued right" to proceed to verdict before the jury then empaneled; here, by contrast, the trial ended in response to a motion filed by the accused himself. In such circumstances there would seem to be little reason for precluding a second trial if the termination of the first trial was erroneous. Otherwise a motion to terminate the trial would travel a one-way street, in which the accused could receive windfall benefits of errors in his favor without facing even the possibility of correction or conviction. The toleration of such errors is, to be sure, part of the constitutional scheme in certain circumstances, but that is so only when the accused

has faced the risk of conviction and the error comes to be embodied in a verdict by the authorized factfinder. An accused who moves in mid-trial to abort the proceedings does not receive the benefits of such a verdict, however, and has no interest in its finality; indeed, the advantage to the accused of such a mid-trial dismissal is precisely that it *avoids* the possibility that the jury will be allowed to consider the case and return a verdict.

3. Two other double jeopardy problems inspired by the tension in this Court's cases already are before the Court. Three petitions filed by the United States raise the question whether the prosecution can appeal from a post-verdict order suppressing evidence in a bench trial; the Tenth Circuit has held that because such orders "terminate" a case in favor of the accused, further proceedings are forbidden.[2] Two petitions filed by the United States raise the question whether the prosecution can appeal from an order dismissing an indictment entered after the jury has been unable to agree and a mistrial has been declared; the Fifth and Ninth Circuits have held, although for different reasons, that once one trial has been completed another cannot be held, even though the first trial ended in a mistrial, when the trial court's action between the first and second trials constituted a "termination" in favor of the accused.[3] We believe that the error of the New York State Court of Appeals and the errors of the Fifth, Ninth and Tenth Circuits stem from a common misunderstanding of the nature of the protections afforded

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[2] *United States* v. *Morrison*, No. 75-1534; *United States* v. *Rose*, No. 75-1535; *United States* v. *Kopp*, No. 75-1536.

[3] *United States* v. *Sanford*, No. 75-1867; *United States* v. *Martin Linen Supply Co.*, No. 76-120.

by the Double Jeopardy Clause and from an improper interpretation of *Wilson*, *Jenkins* and *Serfass*. We therefore believe that it would be advantageous for the Court to consider this Term all three questions concerning appeals by the prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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